

The Insurance Exclusionary Rule Revisited: Are Reports of Its Demise Exaggerated?

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I. INTRODUCTION

The insurance exclusionary rule is one of the oldest enduring doctrines in American jurisprudence.¹ Created by the common law nearly a century ago, the rule has demonstrated a remarkable longevity. It still exists, in one form or another, in nearly every state jurisdiction in this country.² In the federal judicial system, the rule had long been part of the common law and is now codified in the rules of evidence.³

The rule is simple and hardly seems menacing. Basically, it provides that evidence that a party is or is not insured may not be admitted to prove that party's negligence.⁴ Stated differently, it precludes any reference to the topic of "insurance" that is intended solely to divulge the existence of a party's insurance coverage.⁵ The rule's expressed purpose, in turn, appears

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¹ The history of the rule is recounted in Part II, section A of this Article. See *infra* notes 24-32 and accompanying text.

² See 23 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5361, at 426-27 (1980); see generally Annotation, *Admissibility of Evidence, and Propriety and Effect of Questions, Statements, Comments, etc., Tending to Show that Defendant in Personal Injury or Death Action Carries Liability Insurance*, 4 A.L.R.2d 761 (1949) (and later case service; collecting cases).

³ The insurance exclusionary rule was codified in Rule 411 of the Federal Rules of Evidence in 1975. FED. R. EVID. 411. It was patterned after Rule 310 of the Model Code of Evidence, which had restated the common law. 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5361, at 425. Rule 411 is discussed in more detail *infra* notes 56-72 and accompanying text.

⁴ C. MCCORMICK, *MCCORMICK ON EVIDENCE* § 201, at 593 (3d ed. 1984).

⁵ See Ratner, *Insurance: The Forbidden Word*, 3 U. KAN. L. REV. 328, 328 (1955). The court in one early case explained:

While courts have condemned repeatedly attempts to bring before a jury the fact that insurance exists, their condemnation extends only to cases where there is an "avowed purpose and successful attempt" to bring the fact before the jury. It does not extend to cases where the information comes in incidentally in attempting to prove other facts, or where the record does not show that the particular answer was sought or anticipated.

more benevolent than harmful. It seeks to ensure that juries base their verdicts upon legitimate grounds and not upon the improper notion that a judgment adverse to the defendant will be passed along to a "deep pocket" insurance company.⁶

Despite these appearances, however, many within the legal community have said that the rule does far more harm than good, and these critics have been vociferous to say the least.⁷ Indeed, few doctrines in the law have been subject to the type of vituperation heaped upon the insurance exclusionary rule.⁸ Its epithets have ranged from "impracticable"⁹ to a "hollow shell"¹⁰ and an "archaic legal principle"¹¹ that has led courts to "coddle"¹² insurance companies and "indulge in a lot of nonsense."¹³

Hughes v. Quakenbush, 1 Cal. App. 2d 349, 358, 37 P.2d 99, 103 (1934).

⁶ See Note, *Evidence: Revealing the Existence of Defendant's Liability Insurance to the Jury*, 6 CUMB. L. REV. 123, 124 (1975).

⁷ This contempt has been shared by a significant segment of the legal intelligentsia, including judges. See Kiernan v. Van Schaik, 347 F.2d 775 (3d Cir. 1965); Causey v. Cornelius, 164 Cal. App. 2d 269, 330 P.2d 468 (1958); Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, reprinted in 132 F.R.D. 575, 586-88 (1990) (written by a federal district judge in the Northern District of California). This contempt is also shared by some academicians. See 2 D. LOISELL & C. MEULLER, *FEDERAL EVIDENCE* § 193 (1978); C. MCCORMICK, *supra* note 4, § 201; 1 MORGAN, *BASIC PROBLEMS OF EVIDENCE*, § 10.05(e) (6th ed. 1988); 2 WIGMORE, *EVIDENCE* § 282a (3d ed. 1940); 23 C. WRIGHT & K. GRAHAM, *supra* note 2, §§ 5361-69; Fannin, *Disclosure of Insurance in Negligence Trials—The Arizona Rule*, 5 ARIZ. L. REV. 83 (1963); Green, *Blindfolding the Jury*, 33 TEX. L. REV. 157 (1954); Ratner, *supra* note 5; Slough, *Relevancy Unraveled*, 5 U. KAN. L. REV. 675 (1957); Note, *supra* note 6.

⁸ One commentator has opined that the rule has been inundated by an "avalanche of authoritative criticism." Slough, *supra* note 7, at 711. The ruminations of another illustrate the disdain for the rule:

Probably no other step in Texas trial procedure would abolish so many useless annoyances, so many hazards of mistrial, so much expense and so much injustice as would the simple amendment of the rules which prohibit the joinder of the insurer with the insured in negligence cases. Probably also there is no single step that would at the same time restore more integrity to jury trial in personal injury litigation.

Green, *supra* note 7, at 159-60 (footnotes omitted).

⁹ 2 WIGMORE, *supra* note 7, § 282a, at 148.

¹⁰ C. MCCORMICK, *supra* note 4, § 201, at 597.

¹¹ Slough, *supra* note 7, at 713.

¹² Allen, *Why Do Courts Coddle Automobile Indemnity Companies?*, 61 AMER. L. REV. 77 (1927), cited in 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5362, at 428 n.10.

¹³ 1 MORGAN, *supra* note 7, at 254.

Because of its older vintage, the rule has been viewed as an anachronism. Critics of the rule contend that savvy jurors in modern civil actions no longer need the protection it once afforded. Unlike their nineteenth-century counterparts, today's juries supposedly are not influenced by insurance references because they are already aware of the prevalence of insurance in such litigation and may actually presume its existence.¹⁴ Even if this were not so, the rule's detractors assert, the rule is not worth the cost of implementing it. As one treatise writer has stated, "[i]ts costs include extensive and unnecessary arguments, reversals, and retrials stemming from elusive questions of prejudice and good faith."¹⁵

Until recently, this polemic about the viability of the rule has been largely an academic one. Neither the rule nor its criticisms had ever been supported by empirical research.¹⁶ In recent years, however, significant effort has been expended by scholars within the legal and behavioral science fields to discover more about jury dynamics, biases, and behavior.¹⁷ Out of this movement have come studies that shed considerable

¹⁴ These arguments are reviewed in depth *infra* notes 75-83 and accompanying text.

¹⁵ C. MCCORMICK, *supra* note 4, § 201, at 597. A more expansive discussion of this criticism appears *infra* notes 100-16 and accompanying text.

¹⁶ Indeed, each side of the debate has criticized the position of the other for failing to provide such verification. One critic of the rule commented: "So far as I have been able to discover the first ground [supporting the rule, *i.e.*, that juries aware of the existence of insurance are more likely to find for the plaintiff] is established by nothing more than 'judicial knowledge.'" Green, *supra* note 7, at 160. Defending the rule, an advocate countered:

He [Professor Green] suggests . . . that since this assumption is not subject to verification it is not necessarily true, and he cites a case in which a lower verdict was returned on the first trial, when the fact of insurance was before the jury, than on a second trial where evidence of this fact was excluded. There are doubtless other similar instances but they prove nothing.

Gay, "Blindfolding" the Jury: Another View, 34 TEX. L. REV. 368, 372 (1956) (footnotes omitted).

¹⁷ See, e.g., J. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY (1987); J. GOBERT & W. JORDAN, JURY SELECTION (2d ed. 1990); J. GUINER, THE JURY IN AMERICA xvii (1988). During the 1970s, "160 studies of this kind were published, many by law professors, but also by psychologists, sociologists, and other students of the behavioral sciences. . . ." *Id.* An earlier commentator had reported the existence of over 300 such studies prior to 1955. *Id.* (citing W. LOH, SOCIAL RESEARCH IN THE JUDICIAL PROCESS 42 (1984)); S. HAMLIN, WHAT MAKES JURIES LISTEN (1985); V. HANS & N. VIDMAR, JUDGING THE JURY (1986); R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY (1983) [hereinafter HASTIE STUDY]; H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966); S. KASSIN & L. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL (1988); Kessler, *The Social Psychology of Jury*

light on the validity of the rule and its criticisms.¹⁸ Ultimately such studies may help to determine the fate of the rule; in the meantime, at least, they certainly justify its re-examination.

This Article is dedicated to that purpose. Part II reviews the historical foundations of the rule and how it has come to be applied both during trial and *voir dire*.¹⁹ In Part III, this Article will review in depth the criticisms levied against the insurance exclusionary rule—both in terms of its substantive merit, and the procedural and practical difficulties in its implementation.²⁰ Relying on recent studies on jury behavior, Part IV re-examines the substantive criticisms of the rule.²¹ These results appear both to legitimate the rule and to undermine its criticisms. Thus, in Part V, this Article will propose an approach that retains the rule, while alleviating much of the impracticality in implementing it at each stage of litigation.²² Finally, Part VI concludes with three suggested post-trial techniques that, by affording greater insight into the deliberative process of juries, may reduce if not eliminate altogether the need for the insurance exclusionary rule.²³

II. THE HISTORY OF THE INSURANCE EXCLUSIONARY RULE AND ITS IMPLEMENTATION IN MODERN LITIGATION

A. *Origin of the Rule*

The insurance exclusionary rule developed during the late nineteenth century in the wake of the industrial revolution. With the advent of assembly-line production, businesses were able to employ more workers and produce more products. As a result, a greater number of consumers and workers suffered injuries at the hands of new industrial products and machinery.²⁴ Estranged by the impersonal nature of the corporate entities

Deliberations, in THE JURY SYSTEM IN AMERICA 69 (R. Simon ed. 1975) [hereinafter Kessler, *Social Psychology*]; R. LYNN, JURY TRIAL LAW AND PRACTICE (1986); L. SMITH & L. MALANDRO, COURTROOM COMMUNICATION STRATEGIES (1985); V. STARR & M. MCCORMICK, JURY SELECTION (1985); Stephan, *Selective Characteristics of Jurors and Litigants: Their Influences On Juries' Verdicts*, in THE JURY SYSTEM IN AMERICA 97 (R. Simon ed. 1975) [hereinafter Stephan Study]; D. VINSON, JURY TRIALS: THE PSYCHOLOGY OF A WINNING STRATEGY (1986).

¹⁸ Much of Part IV of this Article is devoted to an examination of these studies. See *infra* notes 117, 167 and accompanying text.

¹⁹ See *infra* notes 24-72 and accompanying text.

²⁰ See *infra* notes 73-116 and accompanying text.

²¹ See *infra* notes 117-82 and accompanying text.

²² See *infra* notes 183-239 and accompanying text.

²³ See *infra* notes 240-307 and accompanying text.

²⁴ K. HALL, THE MAGIC MIRROR 123 (1989).

producing this havoc, and embittered by their seeming disregard for its consequences, American society increasingly took to the courts to vent its frustration.²⁵

An insurance explosion followed from the upswing in litigation.²⁶ Until the latter half of the 1800s, insurance was limited primarily to commercial enterprises. Late nineteenth-century employers, however, began to purchase liability insurance to protect themselves against employees asserting work related injuries.²⁷ When workers' compensation eliminated this market, insurers began to diversify types of liability coverage, extending it beyond commercial ventures to more personal subject matters.²⁸ By the 1940s, liability insurance had become a permanent feature of American culture, providing protection "for the everyday hurts inflicted by the multitudinous activities of our society."²⁹

By contract, carriers that provided such insurance were required to conduct the investigation of the claims asserted, and to prepare, plan, and pay for the defense of the insured-defendants.³⁰ Thus, when injured plaintiffs instituted litigation, they were not just suing the defendants whose negligence had allegedly caused their injuries, often they also were fighting the defendants' insurers that had refused to pay their claims.

At the inception of the litigation boom, lawsuits against insured defendants were so infrequent and the availability of insurance coverage so limited that it was believed few jurors would be likely to consider whether the defendant was insured.³¹ Thus, any mention of insurance during the litigation was assumed to highlight for the jury that the defendant would not have to pay the judgment, but would pass the loss on to a financially stable liability insurer.³² Given the growing hostility toward these "deep pocket" businesses, it was assumed that jurors so indoctrinated would be more likely to impose liability against defendants, and their insurers, and would award higher damages when they did.³³ It was upon these two assumptions—of indoctrination and prejudicial impact to the defendant—that the insurance exclusionary rule was created.

²⁵ See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409–10 (1973).

²⁶ See K. HALL, *supra* note 24, at 297; G.E. WHITE, *TORT LAW IN AMERICA* 146–50 (1980).

²⁷ K. HALL, *supra* note 24, at 297; G.E. WHITE, *supra* note 26, at 147.

²⁸ See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* 585 (5th ed. 1984) [hereinafter *PROSSER*]; K. HALL, *supra* note 24, at 297.

²⁹ *Id.* (quoting G.E. WHITE, *supra* note 26, at 150).

³⁰ *PROSSER*, *supra* note 28, at 584–85.

³¹ C. MCCORMICK, *supra* note 4, § 201, at 596; Slough, *supra* note 7, at 710–11.

³² *PROSSER*, *supra* note 28, at 590.

³³ See *Causey v. Cornelius*, 164 Cal. App. 2d 269, 275–76, 330 P.2d 468, 472 (1958) (quoting 10 Cal. Jur. § 29.1, at 629 (10-yr. Supp.)).

B. Operation of the Rule

The insurance exclusionary doctrine has been applied primarily during trial as a rule of evidence.³⁴ Yet it has also been employed during *voir dire*,³⁵ before trial has commenced. This may appear odd at first glance, since no "evidence" is formally presented to the jury at this preliminary stage of the litigation. Nevertheless, like the presentation of evidence, the process of *voir dire* tends to color the predominantly clean slate of judgment that the jurors presumably bring to the jury box.³⁶ Indeed, although *voir dire* is designed to aid counsel in weeding out biased individuals, many attorneys use it to introduce the jury to the parties and the facts involved in the case.³⁷ Thus, both trial and *voir dire* seem

³⁴ Indeed, in this context, most jurisdictions have reduced the doctrine to a statute or a rule of court, *see* 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5361, at 426-27 & nn.11-16, whereas, when applied outside of trial proceedings, the rule remains a product of the common law.

³⁵ *Voir dire* is a pretrial proceeding in which a series of questions are posed to prospective jurors by either the attorneys, the judge, or both. V. STARR & M. MCCORMICK, *supra* note 17, § 2.1.10, at 39, § 9.0, at 241. It provides the parties with an opportunity to discover biases of the prospective jurors and obtain background information that bears on their qualifications. *Id.* § 8.1, at 224.

³⁶ *Voir dire* has been identified as the first stage of impression formation for prospective jurors. L. SMITH & L. MALANDRO, *supra* note 17, § 1.05, at 13, § 1.51, at 92. One recent study suggests that 15% of all jurors may form a predisposition in favor of or against one of the parties after *voir dire*. J. GUINTEHER, *supra* note 17, at 309 (results obtained from jurors who served in federal court; responses to question no. 3). Another survey estimates that as many as 75% of jurors develop "a definite opinion about the case by the end of *voir dire*." V. STARR & M. MCCORMICK, *supra* note 17, § 8.0, at 224.

³⁷ Lawyers often use *voir dire* for many or all of the following purposes:

- 1) to move the jury as a group;
- 2) to discover prejudice;
- 3) to eliminate extreme positions;
- 4) to discover "friendly" jurors;
- 5) to exercise "educated" peremptories;
- 6) to cause jurors to face their own prejudices;
- 7) to teach jurors important facts in the case;
- 8) to expose jurors to damaging facts in the case;
- 9) to teach jurors the law of the case;
- 10) to develop personal relationships between lawyer and juror;
- 11) to expose opposing counsel;
- 12) to prepare for summation.

responsible, admittedly to varying degrees, for molding the mind set of the jury. Because this molding process could, and often does, include indoctrinating the jurors to the existence of insurance in the case, the exclusionary rule has found a home in both contexts.

1. Voir Dire

In *voir dire*, a panel of prospective jurors, known as the venire, are asked by the court or by counsel to respond in person to questions concerning their backgrounds and experiences. Often, plaintiff's counsel will seek to ask the panel whether they possess any past or present connections to the insurance industry. This is when the exclusionary rule comes into play. At this point, defense counsel may invoke the rule to prohibit any such reference to insurance during questioning. The court that must determine the propriety of such an inquiry is then left with a dilemma.

On one hand, it seems that the plaintiff's attorney should be entitled to such information so he or she can make intelligent use of peremptory challenges³⁸ and challenges for cause.³⁹ Jurors who have had at least

A. GINGER, JURY SELECTION IN CRIMINAL TRIALS §§ 7.13-.24, at 280-87 (1977) (quoted as reprinted in S. KASSIN & L. WRIGHTSMAN, *supra* note 17, at 50); see V. STARR & M. MCCORMICK, *supra* note 17, § 8.1.1-.8, at 224-33 (functions of *voir dire* include relaxing jurors, establishing credibility, conditioning jurors to accept the law, educating them about the particular case, avoiding situations that might result in mistrial, nominating the foreperson, and laying a foundation for the opening statement and closing argument). Kassin and Wrightsman point out that only three of these purposes (numbers 2, 3, and 5) are legally sanctioned objectives of *voir dire*. S. KASSIN & L. WRIGHTSMAN, *supra* note 17, at 50-52. One study suggests that attorneys spend between 40% and 80% of their time during *voir dire* attempting to indoctrinate jurors to their view of the case. J. GUINTEHER, *supra* note 17, at 50-51.

³⁸ Peremptory challenges are used by counsel to remove from the venire those persons who they suspect would not be sympathetic to their clients' cases. See J. VAN DYKE, JURY SELECTION PROCEDURES 146 (1977). In exercising peremptory challenges, counsel need not state the reason for requesting that the challenged venire member be excused. See *Swain v. Alabama*, 380 U.S. 202, 220 (1965), *overruled in part on other grounds*, 476 U.S. 79 (1986); V. STARR & M. MCCORMICK, *supra* note 17, § 2.1.12, at 44. Under federal practice, counsel in civil actions are entitled to three peremptory challenges. 28 U.S.C. § 1870 (1982); see FED. R. CIV. P. 24.

³⁹ Unlike peremptory challenges, challenges for cause may only be exercised if accompanied by a valid reason for the challenged juror's discharge. V. STARR & M. MCCORMICK, *supra* note 17, § 2.1.11, at 43. One such reason is the detection of bias which would impair the juror's ability to decide the facts impartially. *Id.* Typical sources of bias which would sustain a challenge for cause include a juror's relation to or acquaintance with the parties, attorneys or witnesses involved in the subject case. J. GOBERT & W. JORDAN, *supra* note 17, §§ 7.03, 7.04. In federal civil actions, the

modest exposure to the insurance industry have been deemed irrevocably biased against plaintiffs who invoked the judicial process to settle disputes, many of which directly or indirectly involved insurance companies.⁴⁰ Accordingly, there seems to be a need to explore the background of each prospective juror for such a connection. Arguably at least, questions that probe the panel for this information are not only relevant to detecting this bias, but also reasonably effective in doing so.⁴¹

On the other hand, counsel for the defense should have the right to ensure that the prospective jurors are not unduly influenced in the

attorneys are permitted an unlimited number of challenges for cause. *See* 28 U.S.C. § 1870 (1982).

⁴⁰ In conducting *voir dire*, attorneys have long stereotyped venire members as "pro-plaintiff" or "pro-defendant" depending upon their occupation. *See* Hermann, *Occupations of Jurors as an Influence on Their Verdict*, 5 FORUM 150, 150 (1970). While these stereotypes were often based on nothing more than instinct or folklore, J. GUNTHER, *supra* note 17, at 91, there is now substantial empirical evidence that indicates that occupational status is a significant source of bias in jurors. Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U. L. REV. 1079 (1965); Hermann, *supra* at 150; Stephan Study, *supra* note 17, at 114. *But see* J. GUNTHER, *supra* note 17, at 91. More specifically, studies have confirmed that insurance company employees do tend to favor defendants in civil actions. *See* L. SMITH & L. MALANDRO, *supra* note 17, § 6A.10, at 105 (Supp. 1988) (citing Adkins, *Jury Selection: An Art? A Science? Or Luck?*, TRIAL, Dec.-Jan. 1968-69, at 37-39; Katz, *The Twelve Man Jury*, TRIAL, Dec.-Jan. 1968-69, at 39-42). These findings are not surprising, for the desire to attack or protect members of certain groups has been identified as a compelling underlying motive influencing juror verdict preferences. HASTIE STUDY, *supra* note 17, at 172-73.

⁴¹ The efficacy of *voir dire* in ferreting out bias has been questioned. One author opined that "[v]oir dire [is] grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting the data which would have shown particular jurors as very likely to prove 'unfavorable.'" Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505 (1965); *see also* S. KASSIN & L. WRIGHTSMAN, *supra* note 17, at 49-56. For this reason, *voir dire* has been eliminated as a means of jury selection in England. *See* W. CORNISH, THE JURY 46 (1968); 26 L. HAILSHAM, HALSBURY'S LAW OF ENGLAND ¶ 628 (4th ed. 1979). Nevertheless, many commentators still contend that *voir dire* is often the main factor in winning or losing cases and should be given "a first priority in importance." L. SMITH & L. MALANDRO, *supra* note 17, § 6A.01, at 72 (Supp. 1988) (chapter authored by Ronald J. Matlon) (citing A. MORRILL, TRIAL DIPLOMACY 1 (Court Practice Institute 1979)); *see also* Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978).

It is beyond the scope of this Article to attempt to resolve this dispute. Suffice it to say that, for whatever its drawbacks, *voir dire* currently is the most commonly employed method for evaluating the qualifications of prospective jurors. Thus, it is the most likely avenue through which the concept of insurance might first be introduced to the venire.

plaintiff's favor by the mention of insurance.⁴² Jurors who have been introduced to the existence of insurance during *voir dire* seem just as likely to be distracted from the key issues of liability as those who hear an improper reference to insurance during trial.⁴³ Regardless of the procedural context in which such indoctrination occurs, the prospect of a resulting bias in favor of the plaintiff may still exist. Thus, the prejudice to the defendant may be equally costly.

In most jurisdictions, courts are afforded discretion in determining the manner in which *voir dire* will be conducted and the scope of the questions posed.⁴⁴ The court's discretion in this regard is usually quite broad, and will not be disturbed by an appellate court unless clearly abused.⁴⁵ The "good faith" standard is by far the one most commonly employed by courts to assist in the exercise of that discretion.⁴⁶ Under this standard, the court will permit insurance questions during *voir dire* if they are presented in good faith by the proponent.⁴⁷

The simplicity of this standard has made its interpretation most difficult. Although courts agree that good faith is not demonstrated when the insurance questions are posed solely for the purpose of introducing the fact of insurance coverage to the venire,⁴⁸ they have had much less success in clarifying what good faith is. No definition has ever been ascribed to the term in this context.⁴⁹ The apparent reason for this ambiguity is that the standard is inherently subjective, focusing upon the hidden motivation of counsel in proposing the inquiry.⁵⁰ To alleviate the difficulty of discovering this motivation, courts have relied on more objective criteria to establish good faith.

⁴² Whether insurance references indoctrinate jurors to assume that defendants are insured is explored *infra* notes 123-33 and accompanying text.

⁴³ The effect which such references have upon the decisionmaking process of juries is examined *infra* notes 134-67 and accompanying text.

⁴⁴ See Annotation, *Propriety and Prejudicial Effect of Federal Court's Refusal on Voir Dire in Civil Action to Ask or Permit Questions Submitted by Counsel*, 72 A.L.R. FED. 638, 649-52 (1985) (collecting federal cases).

⁴⁵ *Id.*

⁴⁶ See, e.g., *Eisenhauer v. Burger*, 431 F.2d 833, 836 (6th Cir. 1970) (applying Ohio law); *Socony Mobil Oil Co. v. Taylor*, 388 F.2d 586, 589 (5th Cir. 1967); *Lentner v. Lieberstein*, 279 F.2d 385, 387 (7th Cir. 1960) (applying Illinois law); *Duff v. Page*, 249 F.2d 137, 139 (9th Cir. 1957); *Braman v. Wiley*, 119 F.2d 991, 993 (7th Cir. 1941) (applying Indiana law); *Bass v. Dehner*, 103 F.2d 28, 36 (10th Cir.), *cert. denied*, 308 U.S. 580 (1939). For a survey of both state and federal jurisdictions using the good faith standard, see Annotation, *supra* note 2, § 16 (and later case service). Federal cases are also collected in Annotation, *supra* note 44, § 7.

⁴⁷ See *Duff*, 249 F.2d at 139; *Bass*, 103 F.2d at 36.

⁴⁸ See *Duff*, 249 F.2d at 139; *Bass*, 103 F.2d at 36.

⁴⁹ Slough, *supra* note 7, at 715.

⁵⁰ *Id.* at 716.

The need for such questioning has been the most compelling objective determinant of good faith. Necessity, in this sense, has depended upon a variety of factors under the circumstances of each particular case.⁵¹ Nevertheless, the deciding factor in the majority of cases has been the mere existence of insurance coverage by the defendant.⁵² When no insurance coverage has been adduced, courts have routinely upheld the denial of this inquiry⁵³ and reversed its admission.⁵⁴ Conversely, when proof of insurance was provided, admission of insurance questions has been approved.⁵⁵

2. Trial

While the application of the exclusionary rule during *voir dire* has remained a part of the common law, the standards for applying the rule at trial generally have not. They have become embodied in statutes or procedural rules patterned after Rule 411 of the Federal Rules of Evidence.⁵⁶ Codifying the common law, the drafters of the Federal Rules of Evidence included in Rule 411 the exclusionary principles regarding insurance.⁵⁷ Rule 411 provides that "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether he

⁵¹ There are four important considerations. First, the probability that the question would overemphasize the existence of insurance in the case. *See, e.g.,* Hallberg v. Brasher, 679 F.2d 751, 753 (8th Cir. 1982); Peterson v. Auto Wash Mfg. & Supply Co., 676 F.2d 949, 953 (8th Cir. 1982). Second, the probability that the same information may have been elicited through other *voir dire* questions. *See infra* notes 186-89. Third, the use of an appropriate admonition by the trial judge that jurors volunteer information which might affect their neutrality. *See* Parento v. Palumbo, 677 F.2d 3, 5 (1st Cir. 1982). Fourth, the degree to which an insurer is actually interested in the case. *See* Louisville & Nashville R.R. Co. v. Williams, 370 F.2d 839, 841-42 (5th Cir. 1966) (insurance company only a subrogee).

⁵² *See generally* Annotation, *supra* note 2, § 16, at 792-802 (collecting state cases).

⁵³ *See* Hallberg, 679 F.2d at 754; Parento, 677 F.2d at 5; Peterson, 676 F.2d at 953; Labbee v. Roadway Express, Inc., 469 F.2d 169 (8th Cir. 1972); Hinkle v. Hampton, 388 F.2d 141 (10th Cir. 1968); Langley v. Turner's Express, Inc., 375 F.2d 296 (4th Cir. 1968); Louisville & Nashville R.R., 370 F.2d at 842; Lentner, 279 F.2d at 387; Duff, 249 F.2d at 140; Smedra v. Stanek, 187 F.2d 892 (10th Cir. 1951).

⁵⁴ *See* Socony Mobil Oil Co., 388 F.2d at 586.

⁵⁵ *See* Wichmann v. United Disposal, Inc., 553 F.2d 1104, 1108-09 (8th Cir. 1977).

⁵⁶ For a list of state jurisdictions that have adopted Rule 411 in *toto*, in part, or with modifications, see 2 D. LOUISELL & C. MEULLER, *supra* note 7, § 192, at 575-76 & nn.5-9 (collecting rules and statutes).

⁵⁷ 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5361, at 425-26.

acted negligently or otherwise wrongfully.”⁵⁸ Like the common-law doctrine, Rule 411 is premised on the notion that the prejudicial indoctrinating effects of such evidence outweigh its relevance to the substantive issue of fault.⁵⁹ As the Advisory Committee Notes attest:

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and the absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.⁶⁰

Nevertheless, Rule 411 does not preclude the use of “insurance evidence” when it is used for a purpose other than to demonstrate the degree of care exercised by the defendant. Specifically, it allows evidence of insurance coverage to be admitted during trial as “proof of agency, ownership, or control,” or to establish the “bias or prejudice of a witness.”⁶¹

Since the rule’s adoption, a number of other exceptions have been added to the rule of exclusion.⁶² For example, admissions by a party either before or after an accident have been allowed as evidence even though the declarant referred to the existence or nonexistence of insurance coverage.⁶³ Also, documents that include a reference to insurance have been permitted.⁶⁴ Some courts have allowed the defendant to prove a lack of insurance when other evidence may have suggested its existence.⁶⁵ Finally, though technically not a recognized exception, witnesses and counsel occasionally will make errant references to insurance during trial.⁶⁶ Though such references lack the blessing of the court, they nevertheless are “admitted” because they are heard by the jury before an appropriate objection can be raised.

Although these exceptions permit the introduction of insurance evidence for the specified purposes, they do not require it. For such

⁵⁸ FED. R. EVID. 411.

⁵⁹ See C. MCCORMICK, *supra* note 4, § 201, at 593–94.

⁶⁰ FED. R. EVID. 411 advisory committee’s note.

⁶¹ FED. R. EVID. 411.

⁶² See 2 D. LOUISELL & C. MEULLER, *supra* note 7, § 194; 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5368; Slough, *supra* note 7, at 713–16.

⁶³ See 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5368, at 465–70.

⁶⁴ *Id.* at 467–68.

⁶⁵ This is sometimes referred to as the doctrine of “curative admissibility.” *Id.* at 470–71.

⁶⁶ See C. MCCORMICK, *supra* note 4, § 201, at 595–96.

evidence to gain admission during trial, its relevance still must outweigh the possibility that it will distract the jury from the real issues in the case.⁶⁷

As in *voir dire*, courts assessing the admissibility of insurance evidence at trial routinely focus on the motive of counsel in seeking to inject the fact of insurance into the case. Invariably, when counsel fails to demonstrate a "good faith" purpose for pursuing the insurance issue, courts are inclined to refuse this line of questioning.⁶⁸ As in *voir dire*, good faith in this context also depends largely upon the circumstances surrounding the request. The decisive factors usually include the presumed knowledge of the jurors regarding insurance,⁶⁹ the frequency and specificity of the references,⁷⁰ the relative need for their inclusion,⁷¹ and the ability to avoid them.⁷²

III. TRADITIONAL CRITICISMS OF THE INSURANCE EXCLUSIONARY RULE

For many years now, the insurance exclusionary rule has been the subject of criticism and contempt by courts and scholars, many of whom have called for its abandonment.⁷³ Though of varying degrees of complexity, these criticisms can be grouped into two general categories—one questioning the substantive merit of the rule, the other focusing on its procedural inadequacies. To understand the source and scope of this discontent, each of these categories is discussed in depth below.

A. Substantive Criticisms

The substantive criticisms refute the dual interrelated notions underlying the exclusionary rule. Contrary to the notion that insurance references promote jury indoctrination, critics assert that such references in fact have no impact upon the decisions of juries because most jurors these days already presume that defendants carry liability coverage. Any

⁶⁷ See 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5365, at 455.

⁶⁸ See *id.* § 5369, at 474.

⁶⁹ See Annotation, *Admissibility, After Enactment of Rule 411, Federal Rules of Evidence, of Evidence of Liability Insurance in Negligence Actions*, 40 A.L.R. FED. 541, 568-69 § 20 (1978).

⁷⁰ See *id.* § 21, at 569.

⁷¹ In other words, it must appear that their probative value outweighs their prejudicial impact. See C. MCCORMICK, *supra* note 4, § 201, at 594.

⁷² 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5369, at 474; see also 2 D. LOUISELL & C. MEULLER, *supra* note 7, § 193, at 581.

⁷³ See *supra* note 7.

indoctrinating effect which might result, they maintain, can be eliminated by appropriate cautionary instructions by the court. Whatever the extent of this indoctrination, detractors of the rule also challenge the premise that its role in the decisionmaking process of the jury is improper. They contend that jurors are entitled to know whether an insurance company is a real party in interest, and so should be freely informed of this fact.⁷⁴

*1. The View that Insurance References Do Not Promote
Indoctrination, or May Be Inhibited from Doing So
by Cautionary Instructions*

As the critics point out, the exclusionary rule was a product of its times. Originating at the turn of the century, it rested on the belief that most jurors were then unaware of the role of insurance in civil litigation.⁷⁵ Since early in the twentieth century, however, critics of the rule have questioned the continued validity of this assumption.⁷⁶

During this century, the argument goes, the lives of few individuals have remained untouched by some form of insurance. Many states have compulsory auto insurance laws that require all individuals owning a vehicle to carry liability insurance.⁷⁷ Many homeowners carry homeowner's insurance to protect against injuries that may occur in or around their dwellings.⁷⁸ Even those individuals who do not own insurance are said to be aware of the insurance crises that have garnered so much publicity in the last thirty years.⁷⁹ For several years, the premiums for manufacturers who engage in risky enterprises have soared because of the number and size of verdicts rendered against them.⁸⁰ Physicians also have decried the increased volume of medical malpractice lawsuits and the subsequent effect upon the expense of medical malpractice insurance.⁸¹

⁷⁴ A concise summary of all the major criticisms is contained in Comment, *Relevancy and Its Limits in the Proposed Federal Rules of Evidence*, 16 WAYNE L. REV. 167, 193 (1969).

⁷⁵ See *supra* note 31 and accompanying text.

⁷⁶ One of the first articles to criticize the rule was published in 1927. See Allen, *supra* note 12.

⁷⁷ See C. MCCORMICK, *supra* note 4, at 596; Fannin, *supra* note 7, at 92 (1963); Green, *supra* note 7, at 166; Slough, *supra* note 7, at 710-11.

⁷⁸ C. MCCORMICK, *supra* note 4, § 201, at 596.

⁷⁹ Green, *supra* note 7, at 166.

⁸⁰ W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 696 (8th ed. 1988).

⁸¹ See PROSSER, *supra* note 28, § 32, at 192-93.

Many insurers, in fact, have initiated advertising campaigns designed to educate the public of the consequences of such awards.⁸²

Against this background, legal commentators have suggested that most jurors today presume the existence of insurance in civil cases and understand its role in litigation.⁸³ This conclusion, if true, would undermine the first major assumption underlying the exclusionary rule—that references to insurance indoctrinate in the jury the belief that the defendant is insured. If the jurors bring this belief with them to the jury box, then there is little need, the rule's detractors assert, to be concerned with the indoctrinating effects of insurance evidence.

Even if the fact of insurance could be overemphasized, critics dispute the contention that this necessarily would have an impact upon the jury. They argue that even excessive references to insurance can be tempered with a cautionary instruction from the judge admonishing the jury to disregard the references and to base its determination solely upon the permissible evidence.⁸⁴ Such an instruction presumably will ensure that the existence of insurance will play no role in the jury's finding of liability or award of damages. With the aid of this prophylactic measure, critics believe, there no longer is a need to insulate the jury from insurance references through use of a doctrinal rule of exclusion.⁸⁵

Such an approach has been adopted by the United States Court of Appeals for the Third Circuit. In *Kiernan v. Van Schaik*,⁸⁶ the court held that, during *voir dire*, if plaintiff's counsel requests to interrogate the prospective jurors concerning their connections with the liability insurance industry, the district court must permit this line of questioning.⁸⁷ In adopting this rule of automatic inclusion, the court indicated that "[j]urors are not unaware that insurance is at large in the world and its mention will

⁸² 2 D. LOUISELL & C. MEULLER, *supra* note 7, § 193, at 579; Fannin, *supra* note 7, at 92. In the 1950s, and again in the 1970s, various insurance companies initiated an advertising campaign designed to inform the public that exceedingly generous civil verdicts are not absorbed exclusively by insurers, but are passed along to the consuming public through higher insurance premiums. See J. GOBERT & W. JORDAN, *supra* note 17, § 7.34, at 238.

⁸³ See 2 D. LOUISELL & C. MEULLER, *supra* note 7, § 193, at 579; C. MCCORMICK, *supra* note 4, § 201, at 596; Fannin, *supra* note 7, at 92; Green, *supra* note 7, at 166; Ratner, *supra* note 5, at 332; Slough, *supra* note 7, at 710-11; Schwarzer, *supra* note 7, at 586-87; Note, *supra* note 6, at 137.

⁸⁴ C. MCCORMICK, *supra* note 4, § 201, at 596; Green, *supra* note 7, at 164 n.22.

⁸⁵ Green, *supra* note 7, at 164.

⁸⁶ 347 F.2d 775 (3d Cir. 1965).

⁸⁷ *Id.* at 782.

not open to them a previously unknown realm.”⁸⁸ Based on this assumption, the court concluded:

It is in fact more realistic for the judge to dissolve the phantom [of insurance] by open talk in the courtroom than to have it run loose in the unconfined speculations of the jury room. The court has wide control over the *voir dire* and can adequately safeguard the inquiry by explaining to the jurors the limited scope and purpose of the examination and thus eliminate any implication of the existence or relevance of insurance in the case before it.

. . . An adequate caution should be given by the court to make it clear to the jury that these questions do not imply either that any defendant is insured or that the matter of insurance or lack of insurance is to be considered in reaching a verdict.⁸⁹

Although the *Kiernan* decision has not been followed by any other federal jurisdiction, neither has it been overturned by the Third Circuit. In fact, it recently has been reaffirmed.⁹⁰ Accordingly, it remains a persuasive testament to the continued vitality of the school critical to the exclusionary rule and to the rule’s possible substantive weaknesses.

2. *The View That It Is Improper To Exclude Insurance Evidence*

In addition to assailing the indoctrinating effects of insurance references, critics have refuted the rule’s second major assumption—that it is improper for juries so indoctrinated to consider the existence of insurance coverage in civil cases. Though, as will be discussed below, these criticisms proceed from a number of different perspectives, they share a couple of common bonds. Each finds such revelations to be important, relevant subjects for the jury’s consideration, and so denies any prejudicial effect from their admission. Perhaps more importantly, each presupposes from such forthright disclosures greater fairness to the jurors, the parties, and the system itself.

A few critics have argued that the defendant’s procurement of insurance may indicate a subsequent willingness to engage in negligent behavior.⁹¹ In this way, they suggest, evidence of insurance coverage is relevant to the basic issue of negligence that permeates most civil litigation.⁹² Wright and Graham, in their multivolume treatise on the

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *Horsey v. Mack Trucks, Inc.*, 882 F.2d 844 (3d Cir. 1989).

⁹¹ 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5362, at 431; Green, *supra* note 7, at 161–62.

⁹² 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5362, at 431.

Federal Rules of Evidence, have supported this view with the following illustration:

It certainly does not seem implausible to suggest that the decision of whether to leave one's fireside to remove ice from the front walk on a winter day in South Dakota might be influenced by the presence or absence of personal liability to strangers who might fall. Certainly the inference is strong enough to satisfy the minimal standard of relevance established by [Federal Rules of] Evidence Rule 401.⁹³

Other detractors of the exclusionary rule have found insurance disclosure indispensable in more fairly apportioning the loss between the parties.⁹⁴ As Professor Leon Green, one of the rule's chief critics, has put it:

On the issue of damages the ability to pay is a highly significant fact, as it is in all affairs of life. Even in the support of churches, local, state and national governments, and other institutions, ability to pay is of the greatest importance. Lawyers, doctors, engineers and others who render professional services take into account the economic status of a client, patient or other patron. If an adequate recovery for the plaintiff in a personal injury case would wipe the defendant out financially, can it be said that this fact is not relevant? Why should an insurance carrier get the benefit of the jury's thinking the defendant is unable to pay at all or to pay full damages? Why should a plaintiff in such a case be denied his full remedy if the insured has paid for protection against his negligence[?]⁹⁵

Finally, a similar, though more oblique, attack upon the rule's exclusionary principle has gained considerable support. It springs from the idea that "[t]he identities of the parties and their interests in litigation are as fundamental to the trial process of the common law, whether by judge or jury, as are any of its other basic principles."⁹⁶ By hiding the existence of insurance, critics lament, the exclusionary rule threatens to subvert this process in two material respects. On one hand, by concealing the identity of insurers as "real parties in interest," the jury is deprived valuable information, including "how witnesses came to be aligned[,] what advantages of litigation are enjoyed by the parties[,] and who is able to

⁹³ See *id.*

⁹⁴ *Id.* § 5362, at 432-33; Fannin, *supra* note 7, at 93.

⁹⁵ Green, *supra* note 7, at 162-63.

⁹⁶ *Id.* at 161.

bear the risk and who is not.”⁹⁷ On the other hand, because the “deep pocket” appearance of defendants tends to be used adversely against them by jurors, insurers whose identities are protected by the rule enjoy an unfair advantage in litigation not shared by other real parties in interest whose identities as defendants remain conspicuous.⁹⁸ Summarizing this view in rather laconic fashion, Wright and Graham have opined:

The need for a rule dealing with the admissibility of evidence of insurance arises because the insurance company is permitted to litigate disguised as its insured....

....

Seen from this vantage point, the issue under [the exclusionary rule] is not the relevance of insurance as evidence of fault but rather how far fact-finding is to be distorted in order to permit insurance companies to remain disguised. If the fear of juror prejudice is sufficient to allow an insurance company to masquerade as the Salvation Army, why should not a black litigant be permitted to hire a white to impersonate him at the counsel table and from the witness stand in order to avoid the well-known impact of racism on personal injury awards?⁹⁹

B. Procedural Criticisms

Perhaps even more scathing criticism of the rule has focused on the impracticality of its implementation during pretrial and trial proceedings.¹⁰⁰ These criticisms have generally fallen into three categories.

The first major criticism is that the standards used to apply the rule are too subjective and thus provide no meaningful guidance to a court in deciding whether to allow the reference. As noted above, the “good faith” standard has been employed by courts to implement the rule both during *voir dire* and trial.¹⁰¹ This test requires the court to delve into the mind of the proponent of the insurance reference to determine whether she has good reason for doing so. The most obvious problem with such a standard is that it is almost impossible to determine clearly the subjective motivation

⁹⁷ *Id.* at 162; see also 2 D. LOUISELL & C. MEULLER, *supra* note 7, § 193, at 578; Fannin, *supra* note 7, at 93; Ratner, *supra* note 5, at 332.

⁹⁸ See 2 D. LOUISELL & C. MEULLER, *supra* note 7, § 193, at 578–79; 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5362, at 433; Wilson, *Evidence of Liability Insurance in Texas*, 2 BAYLOR L. REV. 25, 26–27 (1949).

⁹⁹ 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5362, at 434–35; see also Green, *supra* note 7, at 162–63.

¹⁰⁰ See, e.g., C. MCCORMICK, *supra* note 4, § 201, at 597–98; C. WRIGHT & K. GRAHAM, *supra* note 2, § 5362, at 435–36; Fannin, *supra* note 7, at 93; Green, *supra* note 7, at 167; Slough, *supra* note 7, at 712–13.

¹⁰¹ See *supra* notes 46 & 68 and accompanying text.

behind such a request.¹⁰² Only the proponent can be sure of subjective intent, and she is unlikely to admit bad faith in seeking to introduce the fact of insurance into the case. This is especially true when an insurance question is posed during *voir dire*, since the proponent may usually reasonably contend that she is entitled to know whether the attitudes of the venire towards the insurance industry would affect their ability to decide the case impartially.¹⁰³ It is also true during trial, however, when the

¹⁰² See Slough, *supra* note 7, at 715.

¹⁰³ One federal jurisdiction even requires the admission of insurance questions when requested, holding that they are necessary to the exercise of peremptory challenges. See *Kiernan v. Van Schaik*, 347 F.2d 775 (3d Cir. 1965). In *Kiernan*, the Third Circuit Court of Appeals read the seventh amendment's guarantee of civil jury trials in conjunction with the fifth amendment's due process guarantee and concluded that the right to an impartial jury in a civil action is inherent in the right to a fair trial. *Id.* at 778. From this conclusion, the court reasoned that any impairment of a civil plaintiff's ability to ask insurance questions during *voir dire* would inhibit her exercise of peremptory challenges, and this in turn would jeopardize her right to an impartial jury. *Id.* at 779. Relying upon the United States Supreme Court's decision in *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled in part on other grounds*, 476 U.S. 79 (1986), a criminal case in which the Supreme Court upheld the exercise of peremptory challenges to strike black jurors absent a "pattern" of racial discrimination, the *Kiernan* court held it automatic reversible error for the district court to refuse to allow insurance questions during *voir dire*. *Kiernan*, 347 F.2d at 779-80.

Much has changed, however, in the twenty-five years since *Kiernan* and *Swain* were decided. In recent years, the *Swain* decision has been substantially eroded. While *Swain* attributed a pre-eminent role to peremptory challenges in upholding the fair trial guarantee of the Constitution, contemporary jurisprudence of the Supreme Court does not. In *Ross v. Oklahoma*, 487 U.S. 81 (1985), the Supreme Court rejected "the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Id.* at 88. Noting that peremptory challenges "are not of constitutional dimension[.]" the Court found such challenges not to be ends in themselves, but only the means to achieving the end of providing an impartial jury. *Id.* "So long as the jury that sits is impartial[.]" the Court maintained, "the fact that the defendant had to use a peremptory challenge to achieve that result [when a challenge for cause would have sufficed] does not mean that the Sixth Amendment was violated." *Id.*

Even more than in the criminal context, the importance of peremptory challenges generally, and of *voir dire* specifically, has been eviscerated in the civil realm. In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), the plaintiff had requested a new trial after he learned that a juror during *voir dire* had withheld information which supposedly would have revealed a ground for a peremptory strike. *Id.* at 551. By failing to answer the *voir dire* inquiry correctly, the plaintiff contended, the juror had impaired his right to exercise his peremptory challenges intelligently. *Id.* The Court refused to find that this impairment automatically entitled the plaintiff to a new trial without a showing of prejudice. In applying the harmless error doctrine, the Court opined:

proponent may choose from a panorama of exceptions to justify the reference.¹⁰⁴ Because the meaning of "good faith" varies from jurisdiction to jurisdiction, and from judge to judge, the application and interpretation of this standard is likely to lead to arbitrary and inconsistent findings by courts from case to case.¹⁰⁵

The disparate ways in which the good faith standard is applied during *voir dire* and trial pose an additional problem. Because good faith for asking insurance questions may generally be established merely by showing that the defendant is insured (and this is commonly achieved),¹⁰⁶ it is a rare case in which such an inquiry will be excluded. If jurors will be introduced to the issue of insurance at this stage of the litigation, critics see little good in excluding such references at trial.¹⁰⁷ Once the jurors have been indoctrinated to the belief of the existence of insurance, it is unlikely that further indoctrination could occur. Accordingly, subsequent references to

A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror during *voir dire* examination.

Id. at 555.

The rationale of these cases stands in sharp contrast to the *Kiernan* decision and the position of the exclusionary rule's critics. While the latter maintain that insurance questions are necessary to preserve the peremptory challenge process, which in turn is indispensable to a fair trial in civil cases, recent Supreme Court decisions suggest that limitations may be placed upon the scope of *voir dire* and the exercise of peremptory challenges when it is reasonable to do so. Such restraints are not grounds for automatic reversal, but must be proved prejudicial by the party seeking to overcome them. It follows that there is no substantive requirement that insurance questions be posed during *voir dire*. Such questions may be restricted or precluded so long as the district court has otherwise ensured that the jury selected is reasonably impartial and capable of affording the parties a fair trial.

¹⁰⁴ See *supra* notes 62-66 and accompanying text.

¹⁰⁵ See Slough, *supra* note 7, at 715-16.

¹⁰⁶ Under the Federal Rules of Civil Procedure, parties are permitted to learn during discovery the identity of the other's liability insurer and the extent of coverage. FED. R. CIV. P. 26(b)(2). Thus, the threshold showing of "need," premised as it is on the mere disclosure of the insurer, is now easily met. In fact, the utilization of Rule 26(b)(2) has become so universal, that insurance questions have become a permanent feature in most standardized interrogatory forms for civil actions. See, e.g., D. DANNER, *PATTERN INTERROGATORIES: BASIC FACTS* 140-41 (Cum. Supp. 1985); 6 BENDER'S *FORMS OF DISCOVERY* 312-37 (1991). Thus, it is difficult to imagine an insurance question proponent ever failing to satisfy the good faith standard as so applied.

¹⁰⁷ C. MCCORMICK, *supra* note 4, § 201, at 597; 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5362, at 435-36.

insurance during trial are unlikely to have any prejudicial impact upon the panel.¹⁰⁸

Finally, as a result of the ambiguity in the good faith standard, and the numerous exceptions carved out of the exclusionary rule, critics point out that the rule's effective implementation has been clouded by uncertainty.¹⁰⁹ Any time reference is made to insurance, either by the witnesses or the attorneys, a possible ground for error may arise.¹¹⁰ Thus, to protect the record for appeal, a cautious defense attorney is likely to follow each reference with an objection.¹¹¹ Invariably, such an objection must be resolved at side-bar after a sometimes lengthy discussion with the judge and opposing counsel.¹¹² Often, if the reference is determined to be inappropriate, the judge will then instruct the jury to disregard what it had heard.¹¹³ Not only does this consume time, but as will be discussed later, it may also serve to confuse or even prejudice the jury.¹¹⁴ A trial record sown with insurance references, objections, and instructions in turn will precipitate post-trial motions and even appeals.¹¹⁵ Ultimately, resolution of these matters will depend upon the presumed idiosyncratic predisposition of the judge either in favor of or against the rule itself.¹¹⁶

IV. RE-EXAMINING THE SUBSTANTIVE CRITICISMS

The criticisms of the insurance exclusionary rule raise some serious questions about its current validity. The most critical of these attacks are those that challenge the rule's substantive merit—*i.e.*, its efficacy, purpose, and propriety. Indeed, if, as the critics assert, the disclosure of insurance is not prejudicial, can be remedied with instructions, or is legitimate evidence, then there is no need for the rule. Accordingly, there could be no justification for retaining it, regardless of how efficiently it has been implemented. Thus, before investigating ways of expediting the rule's application, this Part re-examines the critical assaults against the underlying premises of the rule, and its usefulness in modern litigation.

¹⁰⁸ C. MCCORMICK, *supra* note 4, § 201, at 597.

¹⁰⁹ *Id.*; Slough, *supra* note 7, at 712–13.

¹¹⁰ Ratner, *supra* note 7, at 328.

¹¹¹ Causey v. Cornelius, 164 Cal. App. 2d 269, 276, 330 P.2d 468, 473 (1958).

¹¹² *Id.*

¹¹³ Slough, *supra* note 7, at 712–13.

¹¹⁴ *Id.* It appears that cautionary instructions cause juries to focus on the matter they are told to disregard. *See infra* note 142 and accompanying text.

¹¹⁵ *See* C. MCCORMICK, *supra* note 4, § 201, at 597; Green, *supra* note 7, at 167; Note, *supra* note 6, at 137.

¹¹⁶ Although the insurance exclusionary rule has had a history of fairly strict enforcement, some judges now avoid, circumvent, or ignore it. *See* Slough, *supra* note 7, at 713.

A. *Validating the Need for the Rule*

Although the substantive criticisms of the rule bear an abstract appeal, they have never been supported by empirical evidence. On the contrary, the research now available on the subject not only refutes these criticisms, it tends to substantiate the assumptions underlying the rule of exclusion. As discussed below, recent studies suggest that jury indoctrination on the question of insurance is not only possible, but likely, and is not inhibited but exacerbated by cautionary instructions. Nor are the effects of such indoctrination benign; rather, they tend to have a significant influence on the verdicts of juries, both in the imposition of liability and in the award of damages. Insofar as the exclusionary rule impedes such indoctrination and its effects, its continued application appears defensible.

1. *Indoctrination Through Insurance References and the Presumption of Insurance Awareness*

The results from a recent study conducted by the Roscoe Pound Foundation undermine the growing assumption that all or even most jurors presume that civil defendants carry liability insurance.¹¹⁷ The study involved three hundred fifty-two jurors from thirty-eight different civil trials conducted in state and federal courts in southeastern Pennsylvania.¹¹⁸ The jurors were asked to answer two survey forms covering a variety of subjects relating to their jury experience.¹¹⁹ When asked: "Did you think that the defendant carried insurance?" only fifty-four percent of all jurors responding answered affirmatively, eight percent responded in the negative, and thirty-eight percent stated that they "never thought about it."¹²⁰ With regard to jurors who heard suits in federal court, the results were even more damaging—just forty-nine percent thought the defendant was insured, while forty percent never considered the issue.¹²¹ Ninety-four

¹¹⁷ The results of the Pound study are reported and analyzed in J. GUNTHER, *supra* note 17, at xxviii, 385-87.

¹¹⁸ The Pound study also surveyed 7 civil juries from cases tried in Columbus, Ohio, and included a phone survey of 98 jurors who served in civil actions in Phoenix, Arizona. *Id.* at xxviii. With only insignificant differences, the Columbus and Phoenix surveys confirmed the findings from southeastern Pennsylvania. *Id.*

¹¹⁹ The surveys consisted of a long and short form. The long form included 78 questions and was completed by the jurors at home. *Id.* The shorter form had 46 items and was answered by the jurors in the courtroom immediately following the trial. *Id.*

¹²⁰ *Id.* at 298-99 (question 14).

¹²¹ *Id.*

percent of all jurors who believed the defendant was insured based their conclusion on their own personal experiences.¹²²

The numbers provided by the Pound study fail to support the sweeping generalization that all jurors presume the existence of insurance. They indicate that only about half of all jurors come to court believing that there may be insurance to cover a judgment. For this group, the disclosure of insurance either before or during trial may have little or no indoctrinating effect. However, for the other half of the members of the jury, who make no such assumption, the effect may be quite potent.

This effect is demonstrated by the results of the Chicago Jury Project. This study, which was conducted in the late 1950s, examined twenty-three cases tried before juries in a single federal court to answer some of the more perplexing and yet intriguing questions plaguing the administration of the American jury trial system.¹²³ Of particular interest to the project coordinators was the indoctrinating impact, if any, of insurance references on juries.¹²⁴ The findings of the survey confirmed the assumption that such references do promote indoctrination.

In nine cases studied, the plaintiff's counsel was permitted to inquire of the venire whether any member was in any way connected with the defendant's insurance company.¹²⁵ In each case, the question was posed to the entire panel in substantially the following form: "Is anyone here connected in any way or have any interest in the . . . insurance company [specifically naming defendant's insurer, but not mentioning that it was defendant's insurer], whether as [a] stockholder, officer, employee, policyholder, or otherwise?"¹²⁶

Following these trials, eighty-six of the jurors who served in these cases were interviewed to determine whether the *voir dire* inquiry had served to inform them that the defendant was insured. Forty-five of the jurors, over half of those interviewed, admitted that they assumed from the question that the defendant was insured.¹²⁷ Specifically, when asked what had run through their minds after the question was asked, the jurors responded either "the defendant's insurance company" or "that the defendant was insured."¹²⁸ Thirty-one of those questioned indicated that

¹²² *Id.* at 299 (question 15).

¹²³ Background on the history, scope, and purpose of the project is provided by Professor Dale Broeder, one of its coordinators, in Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 744-53 (1958).

¹²⁴ See Broeder, *supra* note 41, at 521-25 (focusing on insurance questions asked during *voir dire*).

¹²⁵ *Id.* at 524-25.

¹²⁶ *Id.* at 524.

¹²⁷ *Id.* at 525.

¹²⁸ *Id.*

they thought of "nothing" in response to the insurance inquiry.¹²⁹ The remaining ten jurors revealed their assumption that the question was intended to elicit their connections to the plaintiff's insurer.¹³⁰

The fact that a majority of those venire members exposed to the insurance questions were then moved to speculate as to the existence of the defendant's insurance appears to provide a testimonial to the effectiveness of *voir dire* in the art of indoctrination.¹³¹ If this were not the case, presumably few or none of the venire members would have made the connection between the question and the defendant's insurer. The fact that a greater number of jurors did not make this connection is also significant. Had an extremely high tally of venire members correlated the insurance inquiry with the existence of the defendant's insurance coverage, it would be a reasonable surmise that the jurors already were sensitive to the role of insurance in any given case, and that the insurance reference during *voir dire* merely heightened that sensitivity. That only a bare majority of the jurors interviewed displayed this sensitivity belies the presumption that knowledge of insurance was pervasive among all.¹³² It suggests, rather,

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Because the jurors were only asked about a specific insurance carrier, and were not questioned for their connections to the insurance industry generally, it is unclear whether such indoctrination varies depending upon the nature of the insurance reference made, and if so, to what extent.

¹³² Another, more recent, study may also subvert this presumption. In 1985, the Rand Corporation's Institute for Civil Justice published a report which culminated five years of research on jury decisions in San Francisco and Cook County, Illinois (including Chicago). See Peterson & Chin, *Juries Don't Ignore Assets And Identity of Defendant*, NAT'L L.J., Nov. 11, 1985, at 15. The study focused on 15,000 cases decided between 1959 and 1980.

Although the survey revealed a high level of stability in the jury decisions during the subject time frame, it suggested that jurors tended to be biased in their treatment of different types of litigants. According to the study, "deep pocket" defendants were dealt with much more harshly by juries than their less financially resourceful counterparts. *Id.* at 16. Specifically, the data revealed that businesses were 10% more likely to be found liable to severely injured plaintiffs than private individuals. *Id.* This disparity in treatment was even more magnified in the size of the awards rendered against each category of defendant. Awards against businesses were generally 50% higher than those incurred by individual defendants. *Id.* And when the plaintiff was severely injured, the disparity in judgment size rose over 400%. *Id.*

From this disparate treatment three inferences might be drawn. One inference is that jurors simply do not consider the existence or nonexistence of insurance in rendering their decisions, but rather base their determinations in part on the defendant's perceived ability to satisfy a judgment. A second inference is that insurance coverage is factored into juries' subjective decisionmaking processes, though it is attributed only to the larger, more financially secure corporate defendants. Finally, it could be inferred that, although juries presume the existence of insurance

coverage for all defendants, they treat corporate litigants differently because of some other intangible factor, including perhaps the impersonal nature of such business entities or their ability to absorb an increase in insurance premiums.

The first two inferences are consistent with the Rand study's reaffirmation of juries' sensitivities to the economic status of defendants and, concurrently, debunk the primary criticism of the insurance exclusionary rule—that juries generally presume that *all* defendants are insured. Were this presumption sound, there would be no need for jurors to distinguish defendants based upon their perceived financial status. The ability of all defendants to satisfy a judgment would be basically the same in the eyes of the jury—each would rely on the “deep pocket” of its insurer. According to the Rand report, however, the juries studied did not treat all defendants merely as conduits through which liability would be passed on to more opulent insurers. Instead, damages were doled out according to the perceived economic assets of each particular defendant.

The third inference—that jurors presume insurance coverage and distinguish defendants on the basis of intangible factors—is possible though less likely. In fact, the only intangible factor that might explain the different treatment of defendants when all are presumed insured is the effect which the imposition of liability may have upon the defendant's ability to pay increased insurance premiums that are likely to result from an adverse judgment. Recent evidence, however, suggests that most jurors do not in this way consider the impact which their verdict will have upon the defendant. *See J. GUNTHER, supra* note 17, at 329-30 (two percent of jurors surveyed indicated a concern that a verdict for the plaintiff would impose too much of a financial burden on the defendant; six percent considered the ability of a “big business” defendant to pay a judgment in deciding to render a verdict for the plaintiff).

To the extent that jurors distinguish unincorporated defendants from their incorporated counterparts on the basis of empathy, this factor would be vitiated by the presumed awareness that in civil litigation insurance companies are the “real parties in interest.” Insurance companies share the same impersonal, corporate characteristics as other large businesses. Thus, if a jury's decision would be influenced by the impersonal nature of a corporate defendant, it stands to reason that the jury would share the same distaste for insurance companies, which are themselves incorporated. Accordingly, if jurors presume that insurers hide behind the veil of all primary defendants, then the identity of the insurer would supplant that of the actual defendant in the eyes of the jury. As a result, *all* combined defendant-insurer “defense entities” should be equally unsympathetic in the eyes of the jury, and *all* should be subject to the increased likelihood of incurring liability, regardless of the sympathetic identity of the primary defendant.

In other words, if all defendants are presumed to have insurance coverage providing an adequate or even abundant source of assets to pay a judgment, then, all other factors being equal, the likelihood and extent of liability should be the same for all similarly situated defendants. It would not matter that one defendant is a private individual and the other a large corporation. Since both are assumed to carry liability insurance, the perceived financial status of each defendant should be irrelevant to the jury's determination. Any concern harbored by the jury pertaining to the financial consequences of its verdict would be assuaged by the presence of insurance coverage.

According to the Rand study, however, the perceived financial status of the defendant is not only considered by juries, it often is determinative of the issues of liability and damages. According to this survey, any information which tends to

that this knowledge was peculiar to only certain individuals, and that for others, such knowledge could be implanted into their minds by use of insurance questions during *voir dire*.¹³³

2. Outcome Determinism and the Ineffectiveness of Cautionary Instructions

Although the above segment of the Chicago Jury Project lends support to the initial premise of the insurance exclusionary rule (that insurance questions tend to indoctrinate prospective jurors), another segment decidedly verifies the rule's second premise (that such indoctrination tends to have an effect upon the outcome of cases). In turn, it undermines the myth, endorsed by the rule's critics, that cautionary instructions can eradicate the effect of insurance indoctrination precipitated during *voir dire*.

In this facet of the Chicago study, thirty "experimental" juries were played tape recordings of a mock trial that was based upon an actual case.¹³⁴ The case involved an auto accident in which the plaintiff, a forty-year-old stenographer, sustained injury when her vehicle collided with that of the defendant.¹³⁵

Three different versions of the case were played before different jury panels. In one version, the defendant revealed to the jury that he possessed no insurance and no objection was made by counsel to this disclosure.¹³⁶ In another treatment, however, the defendant did indicate that he owned insurance. No objection to this disclosure was raised by either counsel.¹³⁷ Finally, in the last version, the defendant again revealed his insurance coverage, but this time defense counsel objected, and the court directed the jury to disregard the reference.¹³⁸

identify the defendant as, or associate the defendant with, a "deep pocket" will have a profound effect upon a jury panel.

¹³³ Professor Broeder, one of the Project coordinators, cautions that most of the jurors interviewed in the study did not cite the *voir dire* reference as the primary factor in their belief that the defendant was insured. Rather, most jurors had to be questioned specifically concerning the indoctrinating effect of the reference before recalling the impact which it had upon them. Broeder, *supra* note 41, at 525. Nevertheless, he cited several examples from the study in which indoctrination "really worked," *id.* at 522-24, and concluded that "the use of the [insurance] question was by no means entirely unsuccessful in achieving its purpose." *Id.* at 525.

¹³⁴ This segment of the Chicago Jury Project was analyzed and discussed in Broeder, *supra* note 123, at 753-54.

¹³⁵ *Id.* at 753.

¹³⁶ *Id.* at 753-54.

¹³⁷ *Id.* at 754.

¹³⁸ *Id.*

The results of this experiment illuminate the hazards of any inappropriate reference to insurance either before or during trial. When the juries were aware that the defendant was not insured, the average award of all verdicts was \$33,000.¹³⁹ This figure increased when the existence of the defendant's insurance was made known to the juries. In such cases, the average damage award approximated \$37,000.¹⁴⁰

Most striking, however, are the results achieved in those scenarios when the fact of insurance was not only disclosed by the defendant, but also referred to by the judge, albeit in a cautionary instruction. Those juries exposed to this tape awarded an average of \$46,000 to the plaintiff, a full \$9,000 and twenty-four percent higher than when no cautionary instruction was given at all.¹⁴¹

Professor Dale W. Broeder, who participated in parts of the Chicago Jury Project, has summarized the important implications of this exercise:

First, that juries tend to award less when they know that an individual defendant is not insured; and, second, that where they know defendant is insured and a fuss is made over it the verdict will be higher than when no such fuss is made. The objection and instruction to disregard, in other words, sensitize the jurors to the fact that defendant is insured and thereby increase the award.¹⁴²

The findings in this aspect of the Chicago Jury Project were based solely upon extrapolations from the disparate verdicts returned by the juries for each of the different trial scenarios. They were not derived from an examination of the actual content of the juries' deliberations. Other studies, however, have utilized this approach to ascertain the effect of insurance considerations upon the decision making process of civil juries.

These studies confirm the results of the Chicago Jury Project. In one, when the deliberations of mock juries were recorded on audiotape, the author noticed jurors spending "some time" discussing the plaintiff's and defendant's insurance.¹⁴³ In still others, the mock juries were observed to "discuss matters the judge told them to ignore or which were not mentioned in the trial, with insurance apparently the topic most likely to turn up in civil jury debates."¹⁴⁴

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Kessler, *Social Psychology*, *supra* note 17, at 83 (discussing Kessler, *A Content Analytic Comparison of the Six- and Twelve-Member Jury Decision-Making Processes* (1973) (Ph.D. dissertation, University of Michigan)).

¹⁴⁴ J. GUINTEHER, *supra* note 17, at 88 (citing Kessler, *Social Psychology*, *supra* note 17, at 83; Erlander, *Jury Research in America*, 4 *LAW & SOC'Y REV.* 345, 350-

The most notable of these studies, and the most recent, is that conducted by the Roscoe Pound Foundation.¹⁴⁵ Although the directors of the study did not record or observe jury deliberations, their findings were premised upon questionnaire answers that provided significant information about the juries' deliberative processes.¹⁴⁶ Like the previous studies, the results of the Pound survey indicate that a significant number of the jurors considered the availability of insurance in their finding of liability and award of damages.

Of the fifty-four percent of the jurors participating in the Pound study who believed that the defendant in each case was insured,¹⁴⁷ eleven percent of the federal jurors, and six percent of the total responding, revealed that knowledge of the defendant's insurance coverage made an "important" difference in their decisions.¹⁴⁸ Twenty-three percent of those who believed the defendant was insured stated that this fact affected their decisions in at least "a minor way."¹⁴⁹ Thus, of all jurors surveyed, approximately fifteen percent were in some way influenced by the presumed existence of the defendant's insurance coverage.

According to the survey, plaintiffs were similarly effected. When asked if they considered in their deliberations whether the plaintiff was covered by Blue Cross or Workers' Compensation, twenty-nine percent of the surveyed jurors responded affirmatively.¹⁵⁰ Out of this group, this assumption made an important difference in the decisions of six percent.¹⁵¹ Thirty-six percent of the remaining jurors who shared this assumption admitted its influence "in a minor way" upon their judgment.¹⁵² With respect to jurors in the federal actions who voted for the defendant, eight percent indicated that they might have voted for the plaintiff, but did not because they believed that the plaintiff was insured.¹⁵³

51 (1970) (citing Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958)).

¹⁴⁵ See generally, J. GUNTHER, *supra* note 17 (recounting the history, purpose, and results of the Pound study).

¹⁴⁶ See *id.* at xxvii-xxviii.

¹⁴⁷ *Id.* at 298-99 (question 14), 343.

¹⁴⁸ *Id.* at 299 (question 16).

¹⁴⁹ *Id.* Nearly 28% of those jurors sitting in state trials admitted that their belief that the defendant was insured influenced their decision in at least a minor way. *Id.*

¹⁵⁰ *Id.* at 303 (question 30), 342. Thirty-six percent of the state jurors admitted to discussing the availability to the plaintiff of Blue Cross or Workers' Compensation. *Id.*

¹⁵¹ *Id.* Specifically the question asked: "[D]o you think it [the discussion regarding the availability to the plaintiff of Blue Cross or Workers' Compensation benefits] made a difference in your decision?" Six percent marked the following preprinted response: "Yes, very much so." *Id.* at 303 (question 31).

¹⁵² *Id.* at 303 (question 31), 342.

¹⁵³ *Id.* at 328-29 (question 67).

The figures suggest that the size of the verdicts awarded also was influenced by the jurors' presumptions concerning insurance. Although no juror admitted basing her decision exclusively on the possible availability of insurance, twenty-seven percent of the total considered the amount of insurance coverage among all defendants in reaching a determination.¹⁵⁴ Thirteen percent of surveyed jurors revealed that they lowered the award to the plaintiff on the assumption that some of the plaintiff's losses were already covered by insurance.¹⁵⁵ Nearly half of the total, forty-seven percent, at least discussed the possibility of plaintiff's insurance coverage during deliberations.¹⁵⁶

Of all these studies, those based upon direct observation of jury deliberations are probably the most accurate and hence the most difficult to second-guess. Nevertheless, each of the methodologies employed in these studies is vulnerable to some criticism.¹⁵⁷ The "mock jury" technique used in the Chicago and direct observation studies has been challenged on several grounds. Often, the "mock jurors" are not screened for bias as are "real" jurors.¹⁵⁸ In any event, since they are not "real" jurors, and thus are not burdened with the actual responsibility of resolving a dispute which will affect the lives of actual litigants, it has been suggested that their consideration of "moot" questions will differ from that of an actual jury.¹⁵⁹ Also, the fact that the "mock" jurors are usually aware that they are a part of an experiment, and are being observed for this purpose, may cause them to become self-conscious about their deliberations.¹⁶⁰

¹⁵⁴ *Id.* at 327. These jurors indicated, however, that it was not the "main" factor in making up their minds. *Id.*

¹⁵⁵ *Id.* at 330.

¹⁵⁶ *Id.*

¹⁵⁷ In fact, none of the methodologies employed to study the decisionmaking process of jurors has escaped criticism. The different techniques and their drawbacks are discussed by Guinther in *The Jury in America*. See J. GUINThER, *supra* note 17. Besides evaluating the mock jury method used in the Chicago Jury Project and the survey method used in the Pound study, Guinther describes the problems with "expert opinion analysis" of jury verdicts as employed by Kalven and Zeisel in their seminal work, *The American Jury*. *Id.* at xviii. There, Kalven and Zeisel assessed the "correctness" of jury verdicts, given a variety of factors, by comparing them to those reached by the judge in the same case, whose expertise, the authors maintained, was "undeniable." H. KALVEN & H. ZEISEL, *supra* note 17, at 46. As Guinther points out, not only is the concept of a "correct" verdict too subjective and thus too elusive to verify, judges who make such a determination are not always competent to do so. J. GUINThER, *supra* note 17, at xviii-xxi.

¹⁵⁸ J. GUINThER, *supra* note 17, at xxii.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at xxiii. This phenomenon will be examined in greater detail *infra* notes 283-99 and accompanying text.

Whatever the merits of these criticisms, they do not destroy the insight which mock jury experiments afford. Though the artificiality of the exercise obviously impairs its usefulness, it is nevertheless apparent that it sheds light on the way individuals in a controlled setting react to the presentation of facts through testimony and argument. The consistency of results achieved by these and other jury research techniques indicates a marked similarity in the decisionmaking process of control groups to jury-like problems.¹⁶¹

Whatever the drawbacks to the methodology of the Chicago study, the survey method employed in the Pound study appears immune from these criticisms. In the Pound study the individuals surveyed were actual jurors who had heard "real" cases. Thus, the aspect of artificiality inherent in the mock jury technique was not a factor in assessing the accuracy of the results obtained.¹⁶² Nevertheless, because Pound relied upon post-deliberation questionnaires, instead of direct observation, the results obtained might be attacked on the ground that the responses of the jurors surveyed were self-serving or distorted given the passage of time following the rendition of the verdicts.¹⁶³ This seems a weak criticism, however, as such distortions were minimized in the Pound study by having the surveyed jurors record their reflections in writing either immediately or shortly after the conclusion of trial.¹⁶⁴

To the extent that the results achieve a considerable consistency, they garner even greater empirical credibility. They suggest that the phantom of insurance is constantly lurking within the jury room. Contrary to the protestations of a growing number of nay sayers, juries *do* consider the existence of insurance in resolving the issues of liability and damages.¹⁶⁵ In

¹⁶¹ See *id.* at xxiv.

¹⁶² *Id.* at xxvii-xxviii.

¹⁶³ See *id.* at xxvii.

¹⁶⁴ *Id.* at xxviii. Reducing the jurors' responses to writing seems to have two salutary effects. First, since most people tend to take the written as opposed to the spoken word more seriously, jurors are more likely to provide an accurate and thoughtful recollection of their experiences if done so in a written medium. See V. STARR & M. MCCORMICK, *supra* note 17, § 10A.1.5, at 85 (Supp. 1990) (indicating that prospective jurors are more likely to provide accurate information concerning their biases when requested to do so in a written questionnaire, than when asked to do so orally during *voir dire*). Second, even though a public oral disclosure may embarrass and inhibit the respondent, or evoke an inaccurate response, the written survey allows the juror to answer honestly and without inhibition. See *id.* § 10A.1.1, at 82-83 (Supp. 1990).

¹⁶⁵ Even so, critics of the exclusionary rule are often heard to argue that there is no clear proof that the consideration of insurance has a prejudicial influence upon the verdicts of juries. See, e.g., Green, *supra* note 7, at 160-61. While the judgments returned may be slightly higher, there is no indication that these awards are unfair or

any given case, this consideration can have a profound effect on either the plaintiff or the defendant.¹⁶⁶ Even if the presumed existence of insurance

unsupported by the evidence. *Id.* It is possible, they believe, that without such considerations, the jury may presume that the defendant is not insured, and thus return a verdict which is too low. *Id.*

Although this is a valid concern, it is not one which is currently capable of proof. What is reasonable and fair is subjective, and might vary from jury to jury. What is certain, however, is that the defendant is entitled to have its liability determined without regard for its ability to absorb the financial consequences of a verdict rendered against it. This rule is premised on the institutional assumption that verdicts are more accurate and thus more fair without such evidence. Indeed, there is some evidence that jurors tend to award higher damages against deep pocket defendants than do judges who are less likely to be influenced by the identities of the parties, and thus may be better barometers of what is "reasonable." *See* H. KALVEN & H. ZEISEL, *supra* note 17. To argue that verdicts only completely compensate plaintiffs when evidence of insurance coverage is disclosed is to indict the entire jury system in America which excludes such considerations.

Perhaps the only way of ascertaining the true operation of insurance evidence on jury verdicts is to examine the deliberations of juries. By observing this process, it might be possible to determine whether juries use insurance considerations to undercompensate plaintiffs or to punish defendants. *See infra* notes 274-308 and accompanying text for a more detailed discussion of the ramifications of observing jury deliberations.

¹⁶⁶ The finding of the Pound and Chicago studies that jurors often presume insurance coverage for both defendants and plaintiffs may appear to be a double edged sword. Those who favor the admission of insurance evidence might argue that, because the conflicting presumptions cancel each other out, the introduction of insurance questions is not likely to affect either party. This nullification process might work in two ways: when the same juror makes both presumptions and thus uses them adversely against neither party; or when an equal number of jurors on a panel make one such presumption, so that in deliberations neither presumption can dominate the decisionmaking process.

This argument, however, fails to withstand closer scrutiny. The results of these studies do not indicate that the same jurors make both presumptions. In fact, the responses suggest just the opposite. For those jurors who presumed the existence of the defendant's insurance, this fact was for some enough to make an important difference in their decisions about the case, regardless of any other assumptions they may have made about the parties or the issues. The same was true of many jurors who admitted to considering the existence of collateral sources of compensation for the plaintiff.

The nullification process is no more likely to occur within the jury as a whole. Although it is statistically possible, it is improbable in any given case that equal numbers of jurors will bring with them these disparate presumptions. Nor is it possible presently to determine when, or if, a jury is so constituted. In any event, even if such a division appeared in all juries, this would not ensure that one or the other presumption would not predominate the decision of the jury as a whole. Indeed, often entire juries are moved by the persuasive statements of a single member. In addition, while an insurance reference made by a witness or judge may be susceptible to either

coverage is only one among many factors considered by the jury, the possibility that it may be the deciding factor renders it potentially prejudicial to the party against whom such a mistaken belief is used.¹⁶⁷

B. Reaffirming the Rule's Legitimacy

Even if speculations about insurance do influence juries, as the data now seems to suggest, critics assert that this influence is a necessary and positive one, not an improper one that must be curbed by a rule of exclusion. They say that juries should consider the existence of insurance, not only because it reflects upon the prudence of the insured-defendant, but, more importantly, because it ensures that insurers are treated like

presumption, an insurance question posed by counsel during *voir dire* realistically is not. Jurors are familiar with the adversarial nature of litigation, in which parties are always seeking to protect their own interests. Thus, when plaintiff's counsel attempts to ask the question (a common scenario in *voir dire*), it is likely that jurors will assume that the question relates to the defendant's insurer, since only their connections to this carrier could bias them against the plaintiff.

Regardless of the interplay between these presumptions, the fact is that any consideration of either party's sources for absorbing the loss is improper. Just as Rule 411 prohibits the use of insurance evidence to prove negligence, *see supra* note 58, the collateral source doctrine precludes the diminution of the plaintiff's recovery because of the availability of insurance to pay for part of the injury sustained. *See generally*, Annotation, *Prejudicial Effect of Bringing to Jury's Attention Fact that Plaintiff in Personal Injury or Death Action Is Entitled to Worker's Compensation Benefits*, 69 A.L.R.4th 131 (1989 & Supp. 1991) (collecting cases on collateral source doctrine); Annotation, *Collateral Source Rule: Right of Tortfeasor To Mitigate Opponent's Damages for Loss of Earning Capacity by Showing that His Compensation, Notwithstanding Disability, Has Been Paid by His Employer*, 7 A.L.R.3d 516 (1966 & Supp. 1991) (same). Introducing insurance questions during *voir dire* will only serve to encourage or at least facilitate such untoward considerations.

¹⁶⁷ Guinther concludes from the Pound study that "insurance . . . does not appear to have, in most cases, a substantive effect either on [the] verdict or on an amount of award rendered." J. GUINThER, *supra* note 17, at 99. Although this assessment seems reasonable purely from a comparative, quantitative standpoint, it seems less reasonable when it is remembered that even one juror who erroneously considers the existence of insurance can influence all others. The fact is, under the Pound findings, nearly a third of all jurors at least consider in their deliberations whether either the plaintiff or defendant possesses insurance. *Id.* at 98. Translated into actual numbers for any given jury panel, this means that at least three or four of every twelve-member panel will ruminate over and possibly discuss the existence of insurance in the jury room. Not only could this group prevent a unanimous verdict when required, it could serve to influence the outcome of both liability and damage issues. Given this insidious potential, any evidence which identifies or even implies the existence of insurance may significantly affect the ability of the parties to receive a fair trial.

other "interested" defendants, and it facilitates a fairer apportionment of the loss between the parties.

The last of these arguments is not directed at the insurance exclusionary rule alone. Rather, it is a more general attack upon the fault system of liability used in every jurisdiction in this country.¹⁶⁸ It would allow damages to be assessed not upon the blameworthiness of the defendant's conduct, but upon the ability of the defendant to pay a judgment.¹⁶⁹ A complete response to such a broad argument is beyond the scope of this Article, and, in any event, has been adequately provided elsewhere.¹⁷⁰ Suffice it to say that such a loss distribution system has never been adopted as a general basis of tort liability in the United States. Until it is, the argument that the exclusionary rule inhibits this sort of loss distribution not only fails to support its abandonment, but favors its retention.

Equally spurious is the argument that the defendant's insurance coverage is relevant to the issue of fault because it illuminates the defendant's risk taking propensities.¹⁷¹ When the defendant is required by law or contract to be insured, a frequent scenario in many civil cases, the existence of insurance is not discretionary and thus cannot be attributed either to prudence or carelessness. In such cases, therefore, this fact is irrelevant in assessing the propriety of the defendant's behavior. But even when the defendant acquires coverage voluntarily, the inference of fault from this decision is, as the drafters of Rule 411 observed, merely "a tenuous one."¹⁷² Indeed, rather than reflecting the defendant's carefree nature, the existence of insurance coverage may give rise to the opposite inference. As one commentator has noted: "[A] person who drives an automobile without protection of public liability insurance is more of a gambler than is the insured driver and hence more likely to take a chance."¹⁷³

An ostensibly more compelling criticism of the rule is that it unfairly protects insurance companies from their own "deep pocket" identities, a disguise not afforded to other interested parties. But even this assertion fails to withstand closer scrutiny. The most obvious response to this concern comes from within the fold of the critics themselves. Professor

¹⁶⁸ See Gay, *supra* note 16, at 368-69.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ Indeed, many of the critics themselves do not find this argument persuasive. See C. MCCORMICK, *supra* note 4, § 201, at 597; 1 M. MARTIN, *supra* note 7, § 10.05(e), at 253-54; Slough, *supra* note 7, at 710.

¹⁷² FED. R. EVID. 411 advisory committee's note.

¹⁷³ See Gay, *supra* note 16, at 370.

McCormick, who described the rule as a "hollow shell,"¹⁷⁴ has concluded that:

[T]his argument begs the question. If the substantive law is that the depth of the defendant's pocket has nothing to do with liability or damages, then why should the jury be apprised of this fact? To be sure, in many cases the relative wealth of the parties is manifest. A multinational corporation cannot disguise itself as a struggling member of the proletariat. But where admittedly irrelevant characteristics can be removed from the courtroom without great strain, it is hard to see why they should be retained.¹⁷⁵

On a juridical basis, this response seems satisfactory. The law in this area sets an ideal standard for guiding the decisionmaking process of the jury. It says that jurors are not to consider the financial status of the parties in reaching a verdict. This ideal would become a mockery, however, if insurers were disclosed as real parties in interest during litigation. It now seems clear that the presence of "deep pocket" entities in litigation entices jurors to disregard this standard.¹⁷⁶ Insurers, whose sole function is to serve as a financial safety net for their clients, are probably more vulnerable to the deep pocket stigma than any primary defendant. Thus, to publicize the insurer's interest in litigation would, in effect, amount to an invitation to the jurors to ignore the prohibition against considering the financial status of the parties.

Nevertheless, the foregoing response is less than convincing from a fairness standpoint. Because juries do consider the primary defendant's financial status in reaching their verdicts, critics wonder why insurance companies should be free from this tendency. To answer this question, one must seek to determine whether the primary defendant's identity may play a legitimate role in the jury's deliberations, and if so, whether the same is true for nonparty insurers.

All that is really known for sure is that when the defendant is perceived to possess a "deep pocket" source of assets, juries are more likely to hold it liable and will impose higher damages when they do.¹⁷⁷ It is not known, however, precisely how the identity of the defendant figures into the jury's judgment.¹⁷⁸ The prevailing assumption is that jurors view this fact in only one way, and use it only for an illegitimate purpose. That is, they see the defendant's wealth as a justification for meting out more severe judgments,

¹⁷⁴ C. MCCORMICK, *supra* note 4, § 201, at 597.

¹⁷⁵ *Id.* at 597-98.

¹⁷⁶ *See supra* note 132.

¹⁷⁷ *See id.* This was the conclusion of the Rand study discussed *supra* note 132. The findings of this study, however, have not escaped criticism. *See* J. GUINER, *supra* note 17, at 172-81.

¹⁷⁸ *See* J. GUINER, *supra* note 17, at 174.

and thus feel less inhibited about imposing them. The actual reason for this phenomenon, however, may not be so simple, or so illicit.

Unlike private, unincorporated tortfeasors, large enterprises confronted by lawsuits these days ordinarily are purveyors of products or services for profit. When the product or service is in some way defective, causing injury to an unsuspecting plaintiff, the purveyor's conduct in marketing that commodity comes in question.¹⁷⁹ Regardless of the theory of the case, the critical question is often whether the merchant acted reasonably given the risks associated with the enterprise.¹⁸⁰ In undertaking this analysis, it is perfectly appropriate for jurors to consider whether the defendant maximized its profit at the expense of precautionary measures.¹⁸¹ By reallocating their resources to provide greater precautionary measures, such defendants have the power to reduce or eliminate such injury producing events. Indeed, the wealthier the enterprise, arguably the more likely it can dedicate substantial resources to the pursuit of this objective, and the higher the public expectation that it will do so. Although the jury may not be apprised of the defendant's exact financial commitment to research and development,¹⁸² it seems likely that jurors would consider the depth of the defendant's pocket generally in evaluating whether it possessed the financial ability to eliminate unreasonable risks associated with its enterprise.

The same rationale, however, does not apply to insurers whose conduct has not caused the plaintiff's injuries and, thus, is not in question in the litigation. Here, the insurer possesses no power to avoid injury producing events. Neither the extent of the insurer's assets nor the reasonableness of their allocation is relevant to the disposition of the case. Thus, unlike primary defendants, an insurer's identity as a "deep pocket" of financial resources can have no legitimate role in the jury's deliberations. Rather, jurors can draw only one inference from the disclosure of an insurer's interest in such litigation: that it is there to provide a fund to protect the defendant from the financial consequences of the verdict. Because this is clearly a prohibited inference, the exclusionary rule appropriately precludes disclosures of insurance and, in so doing, extends to insurers a measure of protection not justified for primary defendants.

¹⁷⁹ See Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 605 n.52 (1980).

¹⁸⁰ See Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 784 (1983).

¹⁸¹ See *id.* at 792-93.

¹⁸² But cf. Note, *Perpetuating Negligence Principles in Strict Products Liability: The Use of State of the Art Concepts in Design Cases*, 36 SYRACUSE L. REV. 797, 830-34 (1985).

V. AMELIORATING THE IMPRACTICALITY OF THE RULE

If, as the foregoing discussion suggests, the exclusionary rule still serves a valuable function, then it is worth maintaining if it can be implemented in a reasonably efficient manner. According to the rule's detractors, however, the impracticality of applying the rule has far outweighed its usefulness. Even though they bemoan the intricate set of standards, procedures, and exceptions that have hindered its administration, few have stopped to consider whether the baggage inhibiting the implementation of the rule is really necessary. A closer examination reveals that by invoking and enforcing current procedural devices, and perhaps in creating a few new ones, much if not all of the "impracticality" in administering the rule can be alleviated if not eliminated.

A. Removing Insurance References from Voir Dire

As was discussed above, the application of the exclusionary rule during *voir dire* has been criticized on two principal grounds: First, that the "good faith" test for implementing it is too vague, often allowing courts to admit insurance questions without articulating any real need for doing so;¹⁸³ second, that, because of the frequent introduction of such questions, jurors are indoctrinated to the existence of insurance before the trial even begins, making it futile to restrict further insurance references.¹⁸⁴ These problems, however, do not necessarily justify abandoning the exclusionary rule during *voir dire* proceedings. In fact, it is just as easy to eliminate the present ambiguity in this area by applying the exclusionary rule more

¹⁸³ See *supra* text accompanying notes 101-05. It is difficult to disagree with this criticism. Because the good faith standard focuses upon the subjective motivation of counsel, it has produced inconsistent and arbitrary results. To the extent that the test has been "defined" by the existence or nonexistence of insurance in each case, it provides little guidance for determining the propriety of admitting such questions. Indeed, with the advent of Federal Rule of Civil Procedure 26(b)(2), which allows either party in civil litigation to discover the existence and amount of insurance carried by the other, it is unlikely that counsel will ever fail to satisfy the good faith standard. At any rate, premising good faith on the existence of insurance seems illogical. If, as the rule's critics suggest, most prospective jurors now assume the existence of insurance coverage even when there is none, it would seem appropriate to allow the insurance questions even when neither party is insured. Because a mistaken assumption in this regard would be as damaging as correct knowledge of insurance established through improper indoctrination, it would seem reasonable to allow insurance questioning in any civil case, not just those in which insurance actually plays a role.

¹⁸⁴ See *supra* text accompanying notes 106-08.

strictly. By entirely prohibiting the use of insurance questions during *voir dire*, the need for the good faith standard would be obviated, and the risk of pretrial jury indoctrination eliminated. This is not to say that the information sought in such inquiries would remain inaccessible to counsel. On the contrary, the same information sought during *voir dire* can be acquired, with greater accuracy and expediency, through alternative investigative techniques.

The purpose for posing insurance questions during *voir dire* is to screen prospective jurors for an insurance industry bias. Usually such questions require the venire to divulge any present or past connections they have had with a liability insurance carrier, including personal employment and stock holdings as well as those of their immediate families.¹⁸⁵ This can be accomplished in a couple of ways, both of which are less likely than *voir dire* insurance questions to emphasize the existence of insurance in the case.

A number of federal and state jurisdictions have imposed a carefully crafted procedure designed to elicit insurance connections while avoiding any reference to insurance.¹⁸⁶ The venire can be asked first whether they or members of their immediate families have ever been employed by a corporation, and if so, they can be asked to identify this employer.¹⁸⁷ The court may then permit inquiry into the nature and extent of such employment.¹⁸⁸ Additionally, the panel can be asked to disclose any past or current securities that they or immediate family members may possess.¹⁸⁹ In combination, these questions are likely to reveal the same information as that sought by specific insurance questions, without the risk of insurance indoctrination.

While the above procedure still depends upon *voir dire* as the means of acquiring this information, nothing in the Federal Rules of Civil Procedure

¹⁸⁵ See, e.g., *Horse v. Mack Trucks, Inc.*, 882 F.2d 844, 845 (3d Cir. 1989); *Hinkle v. Hampton*, 388 F.2d 141, 143-44 (10th Cir. 1968).

¹⁸⁶ This approach was endorsed in the following federal decisions: *Langley v. Turner's Express Inc.*, 375 F.2d 296, 297 n.2 (4th Cir. 1967); *Venable v. A/S Det Forenede Dampskibsselskab*, 275 F. Supp. 591 (E.D. Va. 1967), *rev'd on other grounds*, 399 F.2d 347 (4th Cir. 1968); *Kopycinski v. Farrar*, 63 F. Supp. 857 (D.N.D.), *appeal dismissed*, 155 F.2d 725 (8th Cir. 1946). The state jurisdictions that have implemented this alternative procedure are collected in Annotation, *supra* note 2, § 18, at 813-14 (and later case service).

¹⁸⁷ See *Safeway Cab Serv. Co. v. Minor*, 180 Okla. 448, 449, 70 P.2d 76, 78 (1937).

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

require the use of *voir dire* for this purpose.¹⁹⁰ Upon reflection, it appears that the same information can be obtained, with even less risk of prejudicial jury indoctrination, by posing such questions to prospective jurors before *voir dire* in juror questionnaires.

Most federal jurisdictions already require prospective jurors to fill out a standard juror questionnaire before coming to the courthouse.¹⁹¹ This form typically requires the respondent to disclose her occupation and the occupation of her spouse.¹⁹² If any employment relationship exists between the juror or her family and a liability carrier, it will be uncovered in response to such a question. Nevertheless, such forms do not ask the respondent to reveal past employment histories for herself and her family, nor do they inquire into the family's stock holdings.¹⁹³ Thus, they may be inadequate as written for counsel to thoroughly assess the impartiality of the respondents.

This inadequacy can be remedied, however, either by amending the standard form, or by employing supplemental juror questionnaires.¹⁹⁴

¹⁹⁰ See V. STARR & M. MCCORMICK, *supra* note 17, § 10A.2, at 87 (Supp. 1990) (because no statute or rule has been cited as prohibiting their use, the issue appears to be one committed to the district court's discretion).

¹⁹¹ See G. BERMANT, JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 7 (1982). This informative booklet, published by the Federal Judicial Center, identifies at least two different standard questionnaire forms commonly used by district courts—the Juror Qualification Questionnaire (AO form 178D) and the Juror Information Card (AO form 229). *Id.* These forms are reproduced in the appendices of the booklet. *Id.* app. A&B.

¹⁹² *Id.* at 7–8.

¹⁹³ See *id.* at app. A.

¹⁹⁴ This proposed solution is not new to legal literature. Indeed, it has found particular favor with a number of commentators for over 50 years. See Slough, *supra* note 7, at 717; Comment, *Voir Dire Examination of Jurors Concerning Insurance Company Interests*, 15 DE PAUL L. REV. 148 (1965) [hereinafter Comment, *Voir Dire Examination*] (recommending that insurance questions be included on a questionnaire and answered by prospective jurors prior to trial; thereafter, the jury would be instructed by the court concerning the impropriety of insurance considerations in the finding of liability or damages); Comment, *The Voir Dire Insurance Dilemma*, 28 MISS. L.J. 65 (1956) (advocating the use of a detailed questionnaire containing 17 specific inquiries relating to insurance connections of prospective jurors, their spouses, children, family, and friends; also proposes state procedure for devising and administering such a questionnaire); Recent Decisions, *Practice and Procedure—Under What Circumstances May Counsel Ask Jurors Regarding Their Interest in Insurance Companies, on Trial of a Case Against an Insured Defendant?*, 43 MICH. L. REV. 621 (1944) (suggesting the adoption in Michigan of a questionnaire apparently then used by the Wayne Circuit Court in Detroit, Michigan); cf. Comment, *Jury—Competency of Jurors—Questioning Jurors on Voir Dire as to Their Connections with Insurance Company*, 52 HARV. L. REV. 166 (1938) (suggesting that the venire panel be examined under oath before the commencement of each trial term).

Supplemental juror questionnaires are usually employed in highly publicized or complex litigation to acquire more detailed background information concerning the experiences and attitudes of prospective jurors.¹⁹⁵ In light of the prevalence of insurance in most modern civil litigation, and the significant number of jurors who consider its existence as part of their decisionmaking process,¹⁹⁶ supplemental questions relating to insurance should become a permanent feature on the standard questionnaire in any civil action.

In addition to the standard questions now contained on the form, including the occupation of the respondent and those of immediate family members, the form might also inquire whether respondents or members of their immediate families have ever been employed by an insurance company, specifying the dates and nature of such employment and the name of the employer. Respondents may also be asked whether they or their immediate families have ever held stock in an insurance company. Courts still concerned with the possible indoctrinating effects of such inquiries could eliminate any reference to insurance by structuring the questions to probe the past and present employment of the respondent and immediate family members, together with any stock investments which they may possess.

In this way, counsel will obtain all the information that they traditionally have requested of prospective jurors for the purpose of assessing their partiality for or against insurance carriers. Allowing this line of questioning in a standard form questionnaire will thus eliminate needless appeals by counsel denied the ability to explore this area in *voir dire* and, in turn, avoid the possible prejudicial effect of indoctrination at the early stages of litigation.

But merely asking the venire to divulge insurance connections cannot truly ensure their fitness or unfitness to serve on a jury. To do this, it

At least one district judge has utilized the technique of gathering such sensitive information from prospective jurors. Judge Donald S. Voorhees, formerly of the Western District of Washington, has designed his own juror questionnaire which includes, among many other things, questions concerning the respondents' past or present employment in the insurance industry. See G. BERMANT, *supra* note 191, at 8.

¹⁹⁵ See V. STARR & M. MCCORMICK, *supra* note 17, § 10A.3, at 88 (Supp. 1990). The authors note that such questionnaires are most appropriate in the following cases: highly publicized cases, *id.* § 10A.3.1, at 88 (Supp. 1990); cases involving parties with high name recognition, *id.* § 10A.3.2, at 90 (Supp. 1990); cases in which jurors are likely to have direct contact with a party, *id.* § 10A.3.3, at 95 (Supp. 1990); cases in which personal experience influences case issues, *id.* § 10A.3.4, at 97 (Supp. 1990); and cases involving issues about which most jurors hold strong opinions, *id.* § 10A.3.5, at 100 (Supp. 1990). The insurance issue would seem to fall within at least the last two categories in almost every civil action involving personal injury.

¹⁹⁶ See *supra* note 120 and accompanying text.

would be necessary actually to explore their assumptions and preconceived attitudes regarding the insurance industry and the role it plays in modern litigation. While this is uniformly prohibited during *voir dire* because of the potential for prejudicial indoctrination, it might be possible to pose such questions without this risk in a preliminary questionnaire.

In addition to the questions mentioned above, the questionnaire should contain the following inquiries relevant to this issue:¹⁹⁷

- a) Do you hold a favorable or unfavorable opinion concerning the insurance industry generally, or any specific insurance company in particular? If so, please explain the origin and nature of your opinion.
- b) Do you believe that a jury's verdict should be based in whole or in part on [the respective abilities of the parties to pay for the loss sustained?] or [the availability to the parties of insurance which may pay for all or part of the loss sustained?] Please explain.
- c) Would you be able to reach a verdict based solely upon the law as explained to you by the judge and the facts proved at trial, without considering [the respective abilities of the parties to pay for the loss sustained?] or [the availability to the parties of insurance which may pay for all or part of the loss sustained?] Please explain.

Each of these inquiries attempts to unearth significant information that may help identify individuals who are most likely to consider insurance in their deliberations, and who may make such a consideration determinative on the issues of liability and damages. The first question directly explores the attitudes of the respondents regarding the insurance industry by requiring them to explain their opinion and how they developed it. The second and third interrogatories delve more subtly into the respondents' view of the role of insurance in litigation and their ability to conform this view to the strictures of the judicial system.

¹⁹⁷ Before posing the questions, it might be advisable to briefly explain the purpose of the inquiry. By eliminating the element of wonder and intrigue which the question might otherwise hold, a brief explanatory statement could reduce the likelihood of sensitizing the respondent to the uniqueness and importance of this particular inquiry. The introductory statement might read:

If, under the law and the facts of a case, a party proves that another has caused that party injury or loss, the injured party is entitled to recover from the other damages which fully compensate for the loss sustained. The ability of either party to pay for the loss, either personally or through insurance, is not to be considered in determining the parties' liability or the amount of damages, if any, to be awarded.

Though probing, the questions should be phrased with an eye toward minimizing the possibility of indoctrination. While the suggested questions contain alternative phraseologies which may affect the level of indoctrination they engender, it is believed, for reasons discussed below, that neither version will have a prejudicial effect upon prospective jurors.

By masking the connection between the questions and the specific case which the respondent will be called to hear, the possibility of such indoctrination can be effectively reduced.¹⁹⁸ One subtle way of accomplishing this is to present the questions on a typed, standardized form along with other questions that traditionally have been used during *voir dire* to detect biases. Other subjects that might be explored include the nature and extent of prior serious injuries, the source and amount of any compensation received therefor, and the means of acquiring it; feelings about religion, race, and gender; membership in organizations or unions; and prior lawsuits.¹⁹⁹ Though not all of these subjects will be directly pertinent to every case, the responses to these questions do shed important light on the mind set of the respondents and can be preserved and updated for future reference. Most importantly, the appearance of these additional questions on the form would de-emphasize any potential indoctrinating impact of the insurance questions. This impact can be curtailed even further by including on the form a statement explaining its general purpose: to acquire information concerning the background of prospective jurors for use in evaluating their ability to serve in future, *unspecified cases*.

Just how far in advance of trial these questions should be submitted to the venire is a tricky question. It should be long enough that the respondents are not likely to associate their responses with the case that they are called to hear, but not so long that the responses can become outdated in the meantime. To achieve a balance, it is recommended that the questionnaires be answered by the prospective jurors at least two to three weeks before the commencement of trial. To reduce the association of the form with a specific case, the questionnaires should be mailed to the homes of the prospective jurors, rather than having them fill out the forms in the courthouse in which the trial will be held.

Posing the inquiries in written, standard form questions several weeks before *voir dire* promises several advantages over current practice. First, it is likely to promote a greater sense of responsibility in the respondents to provide thoughtful, complete, and honest answers.²⁰⁰ As the authors of one monograph have observed, "[p]eople tend to believe the written word is more binding than the spoken word. This is illustrated by the difference in

¹⁹⁸ See Comment, *Voir Dire Examination*, *supra* note 194, at 156.

¹⁹⁹ Many of these areas could provide grounds for challenging the respondent for cause. See J. GOBERT & W. JORDAN, *supra* note 17, §§ 7.01-.04, at 193-200.

²⁰⁰ V. STARR & M. MCCORMICK, *supra* note 17, § 10A.1.5, at 85 (Supp. 1990).

dignity accorded a written contract in contrast to an oral contract.”²⁰¹ Although prospective jurors will attempt to color their oral answers to *voir dire* questions in order to protect their public images, they are less likely to do so in response to private, written questions.²⁰² Second, and concomitantly, given the written nature of the standard questionnaire, prospective jurors are more likely to be aware of and take seriously the admonition against providing perjured responses.²⁰³ Third, asking questions by written questionnaire removes the confrontational aspect of *voir dire*. Many jurors report that they feel challenged in *voir dire* to provide “correct” answers so that they might earn a coveted spot on the jury panel and avoid the appearance of failure.²⁰⁴ This compulsion, however, tends to turn *voir dire* into a game of wits between the venire and the judge and attorneys. Standard form questions allow the respondent to provide private answers in a more relaxed atmosphere, thus eliminating the confrontational mode of *voir dire*.²⁰⁵ Fourth, because the questionnaires are answered secretly in this private setting, there is virtually no possibility, as in *voir dire*, that the responses of one venire member will influence the attitude of another.²⁰⁶ Fifth, removing insurance questions from *voir dire* can only serve to expedite that process.²⁰⁷ Sixth, and finally, the temporal and spatial distance between the execution of the standard form by the prospective jurors and the actual commencement of proceedings with *voir dire* reduces dramatically any indoctrinating effect that the questionnaire might have upon them.

These advantages seem to override any drawbacks in this approach. While addressing the lingering concern over the questions’ indoctrinating impact,²⁰⁸ this approach might be viewed as inspiring the same competitive

²⁰¹ *Id.*

²⁰² *Id.* § 10A.1.1, at 82 (Supp. 1990).

²⁰³ *Id.* § 10A.1.6, at 85–86 (Supp. 1990).

²⁰⁴ *Id.* § 10A.1.3, at 84 (Supp. 1990). Studies indicate that less than half of people called for jury duty want to get out of it. See J. GUNTHER, *supra* note 17, at 100. In one study, 94% of individuals who had previously served on a jury declared that they wanted to serve again. *Id.*

²⁰⁵ See V. STARR & M. MCCORMICK, *supra* note 17, § 10A.1.3, at 84 (Supp. 1990).

²⁰⁶ *Id.* § 10A.1.2, at 83–84 (Supp. 1990).

²⁰⁷ According to Starr and McCormick, authors of an extensive text on jury selection, “[t]he two major reasons judges give for approving the SJQ [Supplemental Juror Questionnaire] are that it simplifies the jury selection process and that it saves the court both time and money.” *Id.* § 10A.6.2, at 117 (Supp. 1990).

²⁰⁸ As noted above, however, it is likely that the indoctrinating effect of such questions can be reduced not only by the temporal remoteness of the questions to the litigation, but also by presenting them on an innocuous standardized form. In addition, special effort could be made to downplay the importance of insurance, by focusing

spirit in prospective jurors that at times inhibits their ability to give completely accurate responses to *voir dire* questions. Because the form may appear as a "test" of sorts, some respondents might be induced to provide responses which they feel are "correct," but which are not necessarily true. The nature of the form itself, however, provides some safeguards against such an occurrence. As noted above, unlike in *voir dire*, the respondent does not give the questionnaire responses in public. Thus, the possibility of being embarrassed by an answer is eliminated, and the need to provide a "correct," though inaccurate, answer is diminished. This tendency can be further eradicated by requiring the respondents to supply the requested information under oath, and thus subject to the penalties for perjury.

On balance, then, it is suggested that meaningful jury selection can be afforded, without substantial risk of prejudicial indoctrination, by posing questions during *voir dire* that eschew any reference to insurance, or by allowing insurance questions to be posed to the prospective jurors in a standardized jury questionnaire well in advance of *voir dire*. Either way, the administration of *voir dire* will be expedited, the impartiality of the jury preserved, and the justifications for allowing insurance references at trial reduced by one.

B. Reducing Insurance References at Trial

The main problem with the administration of the exclusionary rule at trial is the morass of "exceptions" that have nearly consumed it. Because attorneys and courts must constantly wrangle over the applicability of the myriad circumstances that can be used to admit "insurance evidence," proceedings are delayed, confusion is created among the jury, and the seeds for mistrials and retrials are sown. The solution, or at least amelioration, of this problem is more difficult than that in *voir dire*. Nevertheless, it is not a hopeless endeavor. Indeed, a closer scrutiny of the exceptions and the way in which they are administered reveals possible means of improvement.

Rule 411 of the Federal Rules of Evidence delineates three exceptional circumstances under which insurance evidence may be admitted—when it is used to prove that a tortfeasor was insured by and therefore an agent of the defendant; when it shows that the defendant insured a premises or structure in which the plaintiff was injured, thereby indicating the defendant's ownership or control of the area; and when it establishes a relationship between a witness and the insurance industry that may demonstrate the

primarily on the ability of *either* party to pay for the loss sustained. Also, phrasing the question in this manner gives appropriate recognition to the fact that jurors tend to apply insurance awareness adversely against both plaintiffs and defendants, and thus may serve to circumvent possible prejudice to either.

witness's bias or interest in the litigation.²⁰⁹ Although this list of exceptions was not intended by the drafters of Rule 411 to be exclusive,²¹⁰ it does signify the circumstances that are most commonly employed to introduce insurance evidence.

While each exception provides a possible grounds for introducing such evidence, the court is not compelled to admit it.²¹¹ Like other forms of evidence, it should not be admitted unless its relevance outweighs the possible prejudice that it may create.²¹² With this in mind, it is clear that courts should be reluctant to admit such evidence, and should only do so in a manner that minimizes its possible prejudicial impact. Although there are ways of achieving this goal, they have not often been implemented.

As a preliminary matter, it should be noted that courts at common law did not permit insurance evidence at all unless the issue for which it was offered was in dispute.²¹³ Although Rule 411 does not contain this restriction in its terms, there is nothing in the comments to the rule which suggest that this was a conscious omission.²¹⁴ Obviously, when the issue is not in dispute, the relevance of such evidence is dramatically vitiated if not negated entirely. Given the potentially harmful indoctrinating effects of this evidence, there appears little basis for admitting it under these circumstances.

But what if the issue of agency, control, or ownership is in dispute in a lawsuit, and plaintiff's counsel wants to establish responsibility by proving that the defendant carried liability insurance covering acts of the tortfeasor, or covering the premises or structure where the plaintiff was injured? Should counsel be permitted to introduce the insurance contract or to question the witnesses for the purpose of proving these issues? The answer should not be an automatic "yes," but should depend on a number of factors, including the strength of the desired, permissible inferences that the proponent seeks to establish, the need for such evidence in each particular case, and the degree to which its introduction can be accomplished without undue prejudice to the defendant.

²⁰⁹ FED. R. EVID. 411. *See supra* text accompanying note 61.

²¹⁰ *See* 2 D. LOISELL & C. MEULLER, *supra* note 7, § 194, at 582; 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5365, at 454.

²¹¹ *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5365, at 455.

²¹² *See* 2 D. LOISELL & C. MEULLER, *supra* note 7, § 194, at 586; 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5365, at 455.

²¹³ *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5365, at 455 & n.10 (citing Walker, *The Problem of Indemnity Insurance in Damage Actions as Answered by the Courts of California*, 11 S. CAL. L. REV. 407, 431 (1938); Comment, *Mention of Defendant's Liability Insurance in the Presence of a Jury*, 56 NEB. L. REV. 153, 155-56 (1977)).

²¹⁴ *See* 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5365, at 455.

Though the procurement of insurance coverage by the defendant over a tortfeasor or dangerous structure may indicate the defendant's belief that it is legally "responsible" for harm caused by that person or premises, this is not the only, or even strongest, inference that might be drawn from such evidence. It could also be inferred that the defendant is a cautious individual who was uncertain of her legal responsibilities.²¹⁵ In any event, the defendant's subjective belief concerning her legal responsibility for the harm is not determinative, and could be inconsistent with the actual legal status of the defendant as established by other facts in evidence. To the extent the defendant's insurance contract specifically defines the relationship of the defendant to the tortfeasor or premises, the persuasive value of this evidence is markedly intensified. Nevertheless, the evidence here is compelling not because of the nature of the document itself (*i.e.*, as an insurance contract), but because it contains an admission of the existence of the relationship in dispute. In this situation, the effect of the evidence as an admission can be preserved by deleting any reference to the *specific* document on which it was contained.²¹⁶ So long as the plaintiff may establish that the defendant had admitted the existence of the relationship in a prior contract, the probative value of the evidence will be maintained, and it often will not be necessary to identify the exact source of the admission. Should the defendant then desire to explain the admission, she would do so at the assumed risk of disclosing the existence of insurance.

The relevance of the evidence in turn will affect the need for its admission. If the insurance contract is the only evidence of agency, ownership, or control, it may be necessary to admit it with the restriction indicated above. Proof of these issues, however, often can be derived from a number of sources. For example, the nature of the agency relationship may be defined or described on a contract between the parties, pieces of correspondence, tax forms, or other forms of demonstrative evidence.²¹⁷ Since most questions of ownership or control involve real estate or automobiles, which usually must be registered under state law, typically these documents serve as a ready source of evidence to establish these issues.²¹⁸ In addition, the testimony of the parties and witnesses is likely to provide the most telling evidence of the intended legal status of the defendant. Given the numerous sources for establishing proof of agency, ownership, or control, the need to admit evidence of liability insurance in any form would seldom be great.

²¹⁵ See *id.* § 5366, at 458.

²¹⁶ See *id.* § 5368, at 467.

²¹⁷ See *id.* § 5366, at 458.

²¹⁸ See *id.*

In fact, the need to present such evidence unexpectedly at trial could be almost completely eliminated by resolving these issues in pretrial proceedings. Under Rule 16 of the Federal Rules of Civil Procedure,²¹⁹ district courts are encouraged to expedite the disposition of cases through use of pretrial conferences²²⁰ and pretrial orders.²²¹ For example, a court may require a pretrial conference to formulate and simplify the issues²²² and eliminate frivolous claims or defenses,²²³ to obtain admissions of fact and documents that will avoid unnecessary proof²²⁴ and cumulative evidence,²²⁵ to render rulings on the admissibility of evidence,²²⁶ and to compel the identification of witnesses and documents.²²⁷ To this end, the court may order the parties to supply pretrial briefs on specified issues,²²⁸ or adopt special procedures for managing potentially difficult actions that involve complex issues or unusual problems of proof.²²⁹ Parties who fail to comply with such orders may be subject to appropriate sanctions.²³⁰

Under Rule 16, therefore, parties intending to present insurance evidence at trial may be required to disclose this fact before proceedings commence. That party may then be directed to identify the purpose for such evidence, its nature (either documentary or testimonial), and any other evidence that will be offered on the issue. If the only evidence supporting this issue is a liability insurance contract, for example, it may not withstand a motion for summary judgment. If, however, there is other relevant evidence, the issue may then be ripe for trial, but the opposing party may seek to exclude the proof of insurance in a motion *in limine*.²³¹ In many cases the court may find the insurance evidence "unnecessary" or "cumulative," and so issue an advance ruling that it will not be admitted

²¹⁹ FED. R. CIV. P. 16(a)(1). Promulgated in 1938, Rule 16 was amended in 1983 to "meet the challenges of modern litigation." *Id.* advisory committee's notes. Finding case management under the old rule lacking, the Advisory Committee proposed the amendment to "[s]harpen[] the preparation and presentation of cases, . . . eliminate trial surprise, and improv[e], as well as facilitat[e], the settlement process." *Id.* Among other things, the 1983 amendment required district courts to issue scheduling orders in most cases, and expanded the courts' power to identify litigable issues. *Id.*

²²⁰ FED. R. CIV. P. 16(a).

²²¹ *Id.* at (b).

²²² *Id.* at (c)(1).

²²³ *Id.*

²²⁴ *Id.* at (c)(3).

²²⁵ *Id.* at (c)(4).

²²⁶ *Id.* at (c)(3).

²²⁷ *Id.* at (c)(5).

²²⁸ *Id.*

²²⁹ *Id.* at (c)(10).

²³⁰ *Id.* at (f).

²³¹ See 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5369, at 472-73.

into evidence at trial. In the event the court elects to receive the evidence, it can admonish counsel concerning the appropriate method for its admission before the jury. When counsel fails to heed this directive, the court may punish the transgressor by imposing sanctions.²³²

A similar methodology could be employed in determining the admissibility of insurance evidence for the purpose of establishing the bias or interest of a witness. Under Rule 16, the parties may be required to indicate before trial each of their witnesses and the subject of their expected testimony.²³³ Thus, long before any witness appears in the courtroom, opposing counsel usually will know whether the witness is employed by the defendant's insurance carrier, whether they have given a prior statement to the insurer, or whether they have been retained by the insurance company, which funds the defense, to testify for a fee at trial. These are the common bases upon which plaintiff's counsel will attempt to impeach the credibility of these witnesses.²³⁴ The important factor in establishing the bias or interest of these witnesses, however, is not so much that they have had contact with the defendant's insurer, but that they may have some allegiance to the "defense" side of the adversarial litigation axis.²³⁵ Accordingly, assuming the court determines in pretrial proceedings that the witnesses may be impeached on this ground, counsel should be instructed that they are only to inquire as to the witnesses' connection to the "defense," and not to identify the defendant's insurer.²³⁶

Besides the foregoing exceptions, evidence of insurance occasionally has been introduced to juries either as an admission of liability by the defendant or through an errant reference made by the witnesses or counsel. Though these "exceptions" occur with much less frequency than those discussed above, their incidence may also be drastically reduced with little effort. An admission may contain a reference to insurance, such as: "Don't worry. My insurance will pay off." In that case the relevance to the question of the declarant's fault is tenuous at best, and often should not survive the balancing process to admit evidence under Rule 403.²³⁷ Even when it does, frequently the reference to insurance can be deleted without

²³² See FED. R. CIV. P. 16(f). According to § (f) of Rule 16, the court may impose such sanctions "as are just," including any permitted by FED. R. CIV. P. 37(b)(2)(B), (C), or (D), as well as the award of any attorney's fees incurred because of noncompliance with the Rule. FED. R. CIV. P. 16(f).

²³³ See FED. R. CIV. P. 16(c)(5); *Brinkman v. Abner*, 813 F.2d 744, 747 (5th Cir. 1987).

²³⁴ See 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5367, at 459-60.

²³⁵ See *O'Donnell v. Bachelor*, 429 Pa. 498, 509, 240 A.2d 484, 489 (1968) (Roberts, J., dissenting).

²³⁶ See *Matthews v. Jean's Pastry Shop*, 113 N.H. 546, 548, 311 A.2d 127, 129 (1973); *O'Donnell*, 429 Pa. at 509, 240 A.2d at 489 (Roberts, J., dissenting).

²³⁷ See *Slough*, *supra*, note 7, at 714.

compromising the value of the admission.²³⁸ As for errant references by witnesses and counsel, these can be substantially reduced through a clear admonition by the court prior to trial that such "lapses" will not be tolerated,²³⁹ and could result in a finding of contempt.

In combination, the pre-emptive measures discussed above can go a long way in eliminating some of the "impracticality" of implementing the insurance exclusionary rule. With the availability of questionnaires and alternative oral questioning techniques, there seems little need ever to allow insurance references during *voir dire*. By requiring counsel to identify their intended uses of insurance evidence before trial, the court can reduce the amount of time spent during trial resolving these questions. At the same time, the pretrial identification and review of such evidence will likely result in the exclusion of much evidence that possesses little or no probative value. In the event a relevant and necessary purpose is offered, the court can limit counsel to stay within the scope of that purpose and can delineate the precise manner in which the evidence can be admitted. Ideally, then, this organized approach to the admission of insurance evidence could expedite the clear presentation of the evidence and might avoid the confusion that often results from extemporaneous and time-consuming, in-court colloquia between the judge and counsel.

VI. PROSPECTS FOR ABANDONING THE RULE: CONTEMPORANEOUS AND POST HOC TECHNIQUES FOR SCRUTINIZING JURY DELIBERATIONS FOR INSURANCE CONSIDERATIONS

Though of promising utility, the foregoing suggestions admittedly contain a serious limitation. Even though they may substantially reduce the likelihood that insurance will be mentioned before, and thus, considered by juries, they cannot prevent such references entirely. This is especially true during trial when there may be legitimate reasons for allowing such references. Thus, even when all appropriate restrictive measures are taken, there is a persistent risk that juries can become indoctrinated to the existence of insurance during trial and that such indoctrination will continue to influence verdicts.

This risk spawned the exclusionary rule in the first place, and has sustained it for nearly a century. Such a rule has been necessary because the judicial system afforded no means of determining whether insurance indoctrination occurred, and if so, whether and to what extent it affected the decisionmaking process of juries. Because of this uncertainty, courts felt constrained to grant mistrials and new trials whenever the rule was

²³⁸ 2 D. LOUISELL & C. MEULLER, *supra* note 7, § 194, at 585.

²³⁹ See 23 C. WRIGHT & K. GRAHAM, *supra* note 2, § 5369, at 473.

transgressed, and insurance indoctrination became even a remote possibility. If courts and parties were afforded some insight into the deliberations of juries, however, such indoctrination could be detected or even avoided, and the wastefulness of retrying cases on mere possibilities alleviated. In turn, the need for the exclusionary rule itself would be virtually eliminated. Because the risk of insurance indoctrination under any approach is appreciable, and its effects significant, there seems adequate justification for exploring this previously forbidden frontier.

This solution, however, also is not without complications. It appears to run counter to a long standing policy of American jurisprudence—that of keeping jury deliberations off limits to the outside world.²⁴⁰ But a closer examination reveals that this conflict may be more ostensible than real. Indeed, it is suggested below that the investigation of the jury deliberation process may be accomplished, and the detection of prejudicial indoctrination facilitated, without jeopardizing the policies that traditionally have favored protecting the jury from such scrutiny.

A. Impediments to the Examination of Jury Deliberations

Before considering possible methods of jury supervision, it is necessary to identify the present limitations inhibiting their implementation. Federal law and procedure are illustrative for this purpose. On the federal level, there are three barriers to the examination of jury deliberations. One, which has been codified by statute, prevents direct observation of the deliberative process itself; a second is embodied in local court rules and limits post-trial contact with jurors; the last, as a rule of evidence, generally excludes testimony by jurors concerning either the form or content of their deliberations.

Prior to 1955, the policy of sheltering juries from outside influences was so deeply ingrained in American legal tradition that few within the legal community had ever considered recording actual jury deliberations. In that year, however, the enterprising coordinators of the Chicago Jury Project did just that. Receiving permission from both counsel and trial judge, but not the jurors, the project coordinators recorded the deliberations of juries in five federal cases tried in a district court in Wichita, Kansas.²⁴¹ Despite extensive security measures, word of the

²⁴⁰ The history of this policy is recounted in Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C.L. REV. 509, 513-25 (1988), and Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920, 922-35 (1978).

²⁴¹ H. KALVEN & H. ZEISEL, *supra* note 17, at vii.

experiment eventually leaked to the press.²⁴² Shortly after its public disclosure, the project was censured by the Attorney General of the United States and a bill was introduced in Congress to prohibit further "jury-tapping."²⁴³ In 1956, Congress enacted 18 U.S.C. § 1508,²⁴⁴ which imposed up to a \$1000 fine and one year imprisonment²⁴⁵ for anyone who "knowingly and willfully"²⁴⁶ "records, or attempts to record"²⁴⁷ or "listens to or observes, or attempts to listen to or observe, the proceedings of any grand or petit jury of which he is not a member in any court of the United States while such jury is deliberating or voting."²⁴⁸ Since the passage of the federal act, which remains in force, at least thirty state jurisdictions have adopted similar legislation.²⁴⁹

Although the jury room door has thus been closed to outsiders, federal law theoretically permits aggrieved parties to gain some insight into the decisionmaking process of the jury through post-deliberative contact with one or more of its members.²⁵⁰ This right, however, has been so greatly circumscribed that it is usually unavailable or unavailing. In many federal jurisdictions, a party seeking to interview a juror following the rendition of a verdict may only do so upon a preliminary showing of "good cause."²⁵¹ Ordinarily, such a showing requires some proof that one or more of the jurors had engaged in misconduct or had been subject to improper influences.²⁵² Since jurors cannot even be contacted until the good cause standard is met, satisfaction of this preliminary burden presumably must depend upon unsolicited revelations of jurors, chance remarks overheard by a party, physical evidence of misconduct left in the jury room, or testimony from nonjuror witnesses.²⁵³

Even if this preliminary showing can be made, the party requesting a juror interview may only do so in accordance with the local rules of the

²⁴² *Id.*

²⁴³ *Id.* Later, excerpts of the deliberations were broadcast with the jurors' permission on the *Frontline* documentary television series. J. GUINThER, *supra* note 17, at 234 n.24.

²⁴⁴ 18 U.S.C. § 1508 (1956).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at (a).

²⁴⁸ *Id.* at (b).

²⁴⁹ J. GUINThER, *supra* note 17, at 234 n.24; H. KALVEN & H. ZEISEL, *supra* note 17, at vii.

²⁵⁰ See *infra* notes 251 & 258 and accompanying text.

²⁵¹ Crump, *supra* note 240, at 527-28 & nn.138, 140. Some jurisdictions require no such showing and, in fact, set forth no standard for the trial judge to follow. *Id.* at 528 & n.139.

²⁵² *Id.* at 528.

²⁵³ *Id.*

jurisdiction in which the case was tried. In most jurisdictions, a party suspecting juror misconduct must so assert in a motion for new trial.²⁵⁴ The decision to grant the movant a hearing is committed to the district court's discretion,²⁵⁵ as is the extent and manner of any investigation permitted by the court.²⁵⁶ In the event a hearing is held, the movant bears the burden of proving both that the misconduct occurred and that such misconduct impaired the movant's ability to receive a fair trial.²⁵⁷

The evidence that the movant may present for this purpose is limited, to say the least. Under Rule 606(b) of the Federal Rules of Evidence, a juror may only testify "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."²⁵⁸ Jurors are prohibited, however, from giving testimony

as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or to dissent from the verdict or indictment or concerning his mental processes in connection therewith.²⁵⁹

According to Rule 606(b), neither the juror's "affidavit [n]or evidence of any statement by him concerning a matter about which he would be precluded from testifying [may] be received" for the purpose of attempting to impeach the verdict.²⁶⁰

Whatever the general merit of these restrictions,²⁶¹ it appears that their application to the insurance-reference dilemma deserves serious

²⁵⁴ See FED. R. CIV. P. 59; FED. R. CRIM. P. 33; Crump, *supra* note 240, at 531; Mueller, *supra* note 240, at 960-61. If, however, the evidence of misconduct does not become known until after the time for filing new trial motions has passed, a collateral attack upon the judgment usually will be permitted. *Id.* at 961.

²⁵⁵ Crump, *supra* note 240, at 531 & n.162.

²⁵⁶ Mueller, *supra* note 240, at 962-63 & n.167.

²⁵⁷ Crump, *supra* note 240, at 531 & n.166.

²⁵⁸ FED. R. EVID. 606(b).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Rule 606(b) and the local rules that implement it seem questionable in both principle and practice. See Crump, *supra* note 240, at 535-42. As for the local rules that permit postverdict interrogation of jurors only upon a preliminary showing of "good cause," it is true that they may serve to deter frivolous attacks upon a verdict; however, they may also prevent many others which may have substance. Because investigation of the jurors themselves is prohibited, the movant is denied access to the primary sources of evidence necessary to satisfy this burden. Parties unable to overcome this tautology are effectively denied an opportunity to be heard on the matter. Even if this result were justified by the screening function served by the good

reconsideration.²⁶² Much effort is expended currently to prevent jurors from being exposed to and influenced by insurance references at every stage of litigation. But even when such references have been minimized, and the jury carefully instructed concerning the boundaries of their fact finding mission, it is still possible that the presumed existence of insurance can play a role in the jury's determination. Indeed, it now appears that of those jurors who consider the fact of insurance in their deliberations, many may not be indoctrinated to the existence of insurance exclusively during the litigation process, but actually come to court with that assumption.²⁶³

cause requirement, it is difficult to justify the arbitrary manner in which it is achieved. The ability to meet this standard depends not upon the skill of counsel or the strength of her argument, but upon the luck and happenstance necessary for obtaining evidence to support it. Indeed, only an eavesdropped conversation or fortuitously discovered witness separates the movant who may pursue a claim of misconduct, and the one who may not.

Even if this burden is met, Rule 606(b) normally will preclude the type of evidence necessary to impeach the verdict and acquire a new trial—that is, testimony from the jurors themselves concerning the nature of the misconduct and its effect, if any, upon the verdict. Allowing only evidence of extraneous information or outside influences, this rule prohibits any reference to other improper matters likely to infect the decisionmaking process of the jury. For example, under Rule 606(b), a juror could not testify that other members of the panel were sleeping or abusing drugs or alcohol during the proceedings, *see Tanner v. United States*, 483 U.S. 107 (1987); that she was pressured to vote with the majority by other jurors, *see Mueller, supra* note 240, at 937–38 & n.74; that she or other jurors ignored or misunderstood the law, *id.* at 936 & n.65; that racial prejudices influenced the verdict or were even discussed, *see Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1595 & n.1 (1988) (citing cases); or, most importantly for this discussion, that one or more of the jurors speculated upon the existence of insurance and its impact upon the judgment, *see infra* note 262. Nevertheless, the same juror would be permitted to testify to such comparatively innocuous matters as the unauthorized viewing of a premises, or the discovery and consideration of books, newspapers, and magazines even marginally related to the trial. *See Mueller, supra* note 240, at 946 & n.107–08.

An example on this latter point demonstrates the capricious way in which the rule operates. Though a court would be permitted to receive testimony that a juror discovered and disseminated among the panel a magazine article discussing generally the insurance crisis and its impact on modern litigation, it would be prohibited from considering evidence that another juror had come to court with a preconception that the defendant was insured, and, on the basis of this assumption, had vigorously attempted to persuade the panel to return a high award against that party.

²⁶² The few federal jurisdictions that have addressed the question have applied the exclusionary principles of Rule 606(b) to prevent jurors from testifying about the discussion of insurance. *See Holden v. Porter*, 405 F.2d 878, 879 (10th Cir. 1969); *Farmers Co-Op Elev. Ass'n v. Strand*, 382 F.2d 224, 230 (8th Cir.), *cert. denied*, 389 U.S. 1014 (1967); Annotation, *Discussion, During Jury Deliberation, of Possible Insurance Coverage as Prejudicial Misconduct*, 47 A.L.R.3d 1299, 1305–11 (1973).

²⁶³ *See supra* note 122 and accompanying text.

In this way, the specter of insurance is even more insidious than other pieces of improper evidence that are openly admitted by the trial court, or are otherwise made known to the jury. Given the propensity of insurance questions to influence determinations of both liability and damages, the need to monitor it is even greater.

B. Possible Solutions

There are at least three carefully tailored procedures that the trial court might undertake to check the propriety of the deliberation process. All three approaches probably are more intrusive into the decisionmaking process of the jury than would be permitted in most jurisdictions. Nevertheless, each approach markedly facilitates the detection of prejudice caused by the topic of insurance and still satisfies the policies animating the rule against impeaching jury verdicts.

1. The Use of Juror Affidavits

The least intrusive method of preventing and detecting the consideration of insurance is for the trial court to issue to the jury prior to deliberations an affidavit form or forms to be signed by each juror and returned to the trial judge along with the verdict. The affidavit could provide as follows:

I [we] hereby attest that the verdict which I [we] have rendered in the above captioned case is premised solely upon the law as explained by the judge and the facts established at trial, and is not to any degree based upon the identity or status of the parties or their respective abilities to pay for the loss sustained in this case.²⁶⁴

If each juror signs the affidavit, it would be presumed that the verdict was not based on insurance considerations and counsel would be precluded from any further investigation into the deliberative process of the jury. If, however, one or more of the jurors fails to endorse the affidavit, the court might conduct a limited inquiry to determine the reason for the omission. Should this interrogation reveal that the existence of insurance was discussed by the jury during deliberations, the court might then expand the scope of the colloquy to determine the nature and extent of any such reference.

²⁶⁴ Direct reference to "insurance" was avoided in order to reduce the likelihood of indoctrination from the affidavit. Nevertheless, because the affidavit may itself serve to discourage the jurors from considering those topics to which it refers, inclusion of such a reference may not be harmful, and may even be appropriate.

Of the three proposals contained in this Article, this one comes the closest to satisfying both the letter and spirit of Rule 606(b). Under its terms, Rule 606(b) appears to prohibit the revelation of matters that *were involved* in the formulation of the jury's verdict; it does not seem to apply to those that *were not*. The proposed affidavit seeks information within the latter category. It attempts not to divine the considerations that motivated the verdict, but only to ensure that the topic of insurance was not one of them. Only when the affidavit is returned unsigned would further investigation of the surrounding circumstances be warranted. Even then, the inquiry would be conducted by the court and would be limited to the reasons for this omission.

Whether permitted by the strict language of Rule 606(b), this procedure does not appear to threaten the policy goals which inspired it. The exclusionary principle of Rule 606(b) is premised upon four basic notions: first, that it is necessary to prevent jurors from being harassed by the losing party who seeks grounds for reversal; second, that it prevents the chilling effect that would occur if the jury's private deliberations were subject to public scrutiny; third, that allowing unrestricted attacks by jurors upon verdicts would undermine the finality of judgments, thus draining the resources of the judicial system and undermining its integrity; and fourth, that jury tampering would result if attorneys were permitted to interview jurors for possible misconduct during deliberations.²⁶⁵

Because the jury is not made to testify specifically to the circumstances surrounding its deliberation, there seems little chance that the affidavit will deter open discussion in the jury room. If anything, it may expedite the deliberations by keeping the panel focused on relevant issues. Any "chilling" effect would likely concern the consideration of only improper topics such as the financial resources of the parties or the existence of insurance coverage. Given this effect, few affidavits would be returned unendorsed, and the need for direct post-deliberation contact with the jury would be rare. As a result, the finality of verdicts would remain largely unaffected, and the opportunity for jury tampering or juror harassment remote. Indeed, in the event a juror failed or refused to sign the affidavit,

²⁶⁵ See Crump, *supra* note 240, at 532-35; Mueller, *supra* note 240, at 923-24 & nn.7-11. With respect to the policies against jury tampering and harassment, the American Bar Association's *Model Code of Professional Responsibility* provides:

After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

further investigation of the matter would not be conducted by counsel, but would be limited to the trial judge, who would have wide discretion in this regard.

While this tactic may seem Orwellian, it possesses several advantages over current practice. Like the standardized juror questionnaire discussed previously,²⁶⁶ the affidavit is likely to make the deliberation process more pointed and thus more efficient. In turn, by requiring all jurors to attest to the propriety of the verdict by applying their signatures to the affidavit, the seriousness of the process will be brought home to the panel. The result should be more thoughtful and focused consideration of relevant issues and evidence. Indeed, it seems unlikely that a juror would deliberately misrepresent the truth by signing an affidavit under penalty of perjury.

Admittedly, the above approach is not perfect. It is possible that some panels either will not read the affidavit carefully or will not take the document seriously, thus returning it to open court as a matter of course completely endorsed, but without any increased reflection. Under such a scenario, any further inquiry into the verdict would be precluded, and the court and counsel would have no greater insight into the thought process of the jury, or the possible prejudicial injection of insurance considerations. If the dereliction among jurors has risen to this level, however, it would be questionable whether the jury system should be maintained as a fair means of resolving disputes. If so, it would seem to require much stricter supervision than the procedure suggested above.

2. *Post-Deliberation Interrogation*

Greater supervision might be provided under the second alternative procedure for the investigation of insurance biases in jury verdicts. Rather than asking the jury to sign affidavits, counsel might be permitted to move following the verdict to have the jury foreperson questioned to determine whether the topic of insurance was discussed during deliberations. The motion could be made orally or in writing, but must be raised prior to the jury's discharge. Only the judge would be permitted to conduct the inquiry.

In ruling on the motion, the court should consider whether the jurors' attitudes towards and connections with the insurance industry have been thoroughly investigated in pretrial questionnaires, as recommended herein, or, less likely, during *voir dire*. The court might also consider the type of case involved (is it one in which most people would expect insurance coverage?—*i.e.*, automobile accident cases), the community in which the case was tried and the experience of its members with insurance issues, the

²⁶⁶ See *supra* notes 191–208 and accompanying text.

nature and extent of any insurance references to which the jury was exposed during the course of litigation, and the legitimacy of the verdict in view of the evidence presented.²⁶⁷

If, after reviewing these factors, the court denies the motion, no further inquiry could be made into the jury's deliberations or the propriety of the verdict. In the event of an appeal from the trial judge's refusal, an appellate court could only reverse the court's decision for an abuse of discretion, and would rely for this determination upon a review of the considerations described above. Should the trial court grant the motion, it might then inquire of the jury foreperson whether the topic had been discussed during deliberations, and if so, what was said. The court would not be permitted to ask the jurors whether, or to what extent, the issue of insurance affected their verdict.

In most instances the interrogation will likely reveal no discussion of insurance and the matter will be ended. When such a discussion has occurred, counsel may submit a motion for a new trial on this basis. The grant or denial of such a motion will then depend upon the nature and extent of the reference within the context of the deliberative process of the jury.²⁶⁸

Despite the initial evaluation of the motion conducted by the court, the recommended approach still might entail eliciting testimony from a juror concerning an event that occurred during deliberations. Thus, under Rule 606(b), the above procedure would probably be prohibited in the federal judicial system.²⁶⁹ It would not, however, violate procedural rules in many state jurisdictions that have adopted Rule 606(b) or have developed their own counterpart.²⁷⁰ In these jurisdictions, courts have interpreted the "no impeachment" rule to allow jurors to disclose statements made during

²⁶⁷ Many of these same factors are presently considered by courts in deciding whether to permit insurance questions during *voir dire*. See Annotation, *supra* note 2, § 16, at 798-802.

²⁶⁸ Courts that have had cause to consider the prejudice resulting from the discussion of insurance during jury deliberations seem to have relied upon the following factors: The nature and extent of the discussion (*i.e.*, was it casually or deliberately considered); the point in the deliberations at which the discussion occurred (*i.e.*, whether the discussion occurred before or after the verdict was reached); and any censure or rebuke by a fellow juror following the discussion. See Annotation, *supra* note 262, § 2[a], at 1303-04.

²⁶⁹ See FED. R. EVID. 606(b) ("[A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations . . .").

²⁷⁰ States that have adopted their own versions of Rule 606(b) include Arizona, Arkansas, Florida, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Wisconsin, and Wyoming. Mueller, *supra* note 240, at 921 n.2, 934 & nn.55-58.

deliberations, though not the impact that these may have had upon the decisionmaking process of the jury.²⁷¹

No matter how the letter of 606(b) is interpreted, one thing is fairly certain: the colloquy between the judge and jury foreperson would not seem to violate in any meaningful way the policies underlying that rule. By delegating to the court the sole right to question the jury, counsel are afforded no opportunity to either harass or tamper with the jurors. Moreover, because the party making the motion must first show some basis for invoking this procedure, the finality of most judgments will remain undisturbed. When this burden is met, and the colloquy is permitted, the scope of the interrogation will be limited to the nature of any insurance references, and will not inquire into their impact, if any, upon the verdict. Given the limited nature of this procedure, no chilling effect upon the jury's deliberations is likely to result from the interrogation. If anything, only a discussion of the impermissible topic of insurance would be deterred. In the unusual case when such a discussion is disclosed, both the trial and appellate courts would have a far better perspective from which to assess the prejudicial effect of this discussion upon the jury's deliberations.

Nevertheless, it might be argued that to permit investigation of jury deliberations is to remove the lid from Pandora's box. Instead of aiding the administration of the judicial system, some may say that such a procedure will invite additional motions and appeals by litigants dissatisfied by the outcome of litigation. This fear, however, is not justified.

The recommended approach would change current practice in two ways: first, a party wishing to file a new trial motion on the basis of an erroneously admitted insurance question would first be required to invoke the questioning procedure outlined above and second, in later deciding the new trial motion, the court will have the benefit of the additional information gained during the colloquy with the jury foreperson. Besides the additional time the court would spend conducting such colloquies, the burden placed upon the district courts by this procedure seems to be minimal. Because the questioning process is just as likely to reveal no

²⁷¹ This approach has been termed the "Iowa rule" because it was first adopted by the Iowa Supreme Court in *Wright v. Illinois & Mississippi Tel. Co.*, 20 Iowa 195 (1866). Florida, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, Washington, and Wisconsin all had at one time adopted the Iowa rule. See Crump, *supra* note 240, at 516 n.51. After the passage of Rule 606(b), however, North Dakota, Ohio, Texas, and Wisconsin abandoned the Iowa rule in favor of Rule 606(b). *Id.*

The original Advisory Committee drafts of Rule 606(b) had endorsed the Iowa rule. See FED. R. EVID. 606(b) historical note. This approach also originally was favored by the United States House of Representatives. See Mueller, *supra* note 240, at 930. However, the Senate amended the House version, and Rule 606(b) was enacted in its present form. *Id.*

prejudicial discussion of insurance as it is to uncover such an illicit consideration, the adoption of the recommended procedure is not likely to encourage parties to file more new trial motions or raise additional grounds for error when they do. In fact, the additional procedure may have just the opposite effect. When the trial court conducts the inquiry of the jury foreperson and no insurance discussion is revealed, there would be no good faith basis for pursuing this issue in a motion for new trial.²⁷² In any case, the determination of prejudice under this procedure would still be committed to the discretion of the trial court.

The impact of this procedure upon the workload of the appellate bench probably would be no more onerous. At worst, it might precipitate three types of alleged errors, none of which are likely to be appreciable in number or difficult to resolve. For example, when the trial court refuses to conduct the requested interrogation, a claim of error may ensue. In this situation, however, the trial court's decision is based upon the same discretionary factors as those now used to decide motions for new trial involving the erroneous admission of insurance evidence.²⁷³ In reviewing either decision, the appellate court is faced with a single question: Was there sufficient basis for the trial court to believe that the introduction of insurance references had a prejudicial indoctrinating impact upon the jury? If answered in the negative, the movant is entitled neither to a post-deliberation examination of the jury foreperson under the proposed approach, nor to a new trial under current practice. Regardless of the means by which this issue is raised, it is subject to the same "abuse of discretion" review currently undertaken by the appellate court.

A second ground for error might arise if the court agrees to conduct the questioning, but then does a less than thorough job. Like the administration of *voir dire*, however, the scope and manner of such questioning would be committed to the sound discretion of the trial court, and the exercise of that discretion is infrequently disturbed by the appellate bench. In any event, the basis for such a claim could be almost entirely eliminated if the trial court encourages and receives input from the parties on the form of the questions asked.

The final claim of error might arise when the trial court conducts the post-deliberation examination of the foreperson, but nevertheless decides the issue of prejudice unfavorably in the motion for new trial. The appellate court's review in this situation would be identical to current practice except in one major respect—the court would possess much more

²⁷² Accordingly, such a motion may be subject to sanctions under FED. R. CIV. P. 11.

²⁷³ See *supra* notes 69–72; see also Annotation, *supra* note 2, § 16, 798–802.

information than is currently provided concerning the thought process of the jury and the injection into that process of any improper considerations.

Far from jeopardizing the integrity of the jury system, the proposed procedure promises to make the decisional process more accountable and thus more fair. It gives the court the ability to ensure that impermissible factors such as the existence of insurance do not play a significant role in that process. In this way, it may help clear up uncertainty in this area, since no longer will courts have to engage in the speculation that review of this issue has required. As a result, the proposed procedure may actually serve to streamline both the post-trial and appellate process in this area.

3. Recording Jury Deliberations

The third and final proposed procedure for detecting insurance indoctrination is the use of recording devices in the jury room.²⁷⁴ Because of the general prohibition against recording jury deliberations, this approach is not susceptible to immediate implementation. Thus, like the use of juror interviews discussed above, it is offered merely as an ideal model.

The need for such a model is demonstrated by the untoward legacy perpetuated by the current policy of deliberative isolation. By locking the jury room door to behavioral scientists, this policy has precluded meaningful investigation and improvement of the primary form of dispute resolution used in this country. At the same time, it has blinded the judicial system to the decisionmaking processes of juries, forcing courts to decide cases upon nothing more than the speculation of what might have happened in the jury room.

This has been especially apparent, and troubling, in the handling of insurance questions. Because of the prohibition against recording jury deliberations, there presently is no way to determine whether the mention of insurance before juries has any effect upon their consideration and disposition of civil cases. If these deliberations were subject to the looking glass of technology, however, there is reason to believe that the chimera of insurance indoctrination could be eliminated.

No doubt, permitting the recordation and review of entire jury deliberations would have ramifications far exceeding those suggested above. Indeed, to make a record of these proceedings would mean to

²⁷⁴ Such devices could include either videotape or audiotape equipment. Obviously, videotaping deliberations would be more obtrusive than merely making an audio record; however, the videotape would provide a more complete picture of the deliberative process. It is not necessary for this discussion to select one alternative over the other. Either method would facilitate the detection of insurance considerations, and so would be preferable to current practice.

subject them to scrutiny for all their ills—not just the occasional discussion of insurance. Once the inner sanctum had been penetrated by the eyes and ears of technology, the broad insight that they have to offer could not be ignored. Just what the full impact of this procedure may be is beyond the scope of this paper and is better left to those more knowledgeable. Nevertheless, this Article generally embraces the idea of recording jury deliberations, and suggests below how this procedure can help resolve the insurance question dilemma without undermining the jury system as we know it.

The recommended “procedure” would begin during the trial judge’s instructions to the jury. After charging the jury on the law and the constraints of their fact finding mission (including an instruction that the ability of the parties to pay for the loss sustained is not a legitimate consideration), the judge should inform the jury that its deliberations will be recorded. In addition, the judge should disclose the location of the recording device and explain that the recording will not be monitored by the judge or attorneys but only by a court officer (bailiff, clerk) to ensure no mechanical difficulties. Further, the instruction should explain the purpose of the device: to promote fairness and efficiency in the system by ensuring that the jury follows the instructions of the court and does not get side tracked on irrelevant issues. Finally, the judge would tell the jurors that the tape recordings eventually would be viewed only by the judge(s) and attorneys handling the case, and would be kept from the public unless the jurors agreed otherwise.

Inside the jury room the recording device should be positioned in a conspicuous location so the jury will not waste time attempting to find it. By the same token, its location should not be distracting. Positioning the camera or microphone in a ceiling corner, as is done in banks and convenience stores, would probably suffice for this purpose. Once the jurors enter the jury room, the devices can be activated by the officer monitoring the recording and shut off when they depart.

After the conclusion of the trial, the court would retain the original recording of the deliberations and could order it sealed from public disclosure.²⁷⁵ Copies of the tape would be forwarded to the attorneys for

²⁷⁵ There seems to be ample precedent for courts to deny public access to the deliberation tapes. Although the public has a right of access to judicial records, *see generally* Annotation, *Public Access to Records and Proceedings of Civil Actions in Federal District Courts*, 96 A.L.R. FED. 769 (1990) (surveying federal cases considering the scope of this right with respect to various court records), it is questionable whether the tapes would automatically become part of the official court record. Because jury deliberations traditionally have not been subject to public scrutiny, the public would enjoy no special right of access to the deliberation tapes. *United States v. Harrelson*, 713 F.2d 1114, 1118 (5th Cir. 1983). The tapes might

review in preparation of new trial motions. If, upon review of the tape, counsel allege that insurance was considered during the deliberations, this allegation must be asserted in post-trial motions, specifically identifying the misconduct and where it is reflected on the tape. Failure to object to this specific form of misconduct in post-trial motions would waive any future objection to it, unless the prejudice therefrom is manifest.²⁷⁶

The trial court would decide the motions on the basis of the tape and any other circumstances presently permitted under the law. As always, this

only become part of the official court record if the court is called upon, by motion, to review the tape for error and reduce its findings in an order or opinion. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 898-901 (E.D. Pa. 1981). Even if the tapes are included in the record, the public's right to see them is not absolute. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). This right could still be restricted upon a showing of an over-riding governmental interest in keeping the tapes free from public scrutiny. Annotation, *supra*, § 2 (and cases cited therein). Such a showing should not be difficult, since the current prohibition against recording deliberations is premised upon a strong governmental interest in protecting jurors from post-verdict harassment and preserving the integrity of the judicial system. See text accompanying notes 265 & 281.

There presently are numerous situations in which the public's access to court proceedings and records may be restricted. A court may issue a pretrial order precluding counsel, the parties, or witnesses from discussing a pending case. See Annotation, *Validity and Construction of Federal Court's Pretrial Order Precluding Publicity or Comment About Pending Case by Counsel, Parties, or Witnesses*, 5 A.L.R. FED. 948 (1970) (collecting cases). Likewise, it may seal discovery material upon a showing of good cause that it involves trade secrets or other confidential research, development, or commercial information. FED. R. CIV. P. 26(c)(6),(7),(8). A court may also place restraints upon post-verdict communication between news media and jurors in federal cases. See *Harrelson*, 713 F.2d at 1114 (juror refused press interview, the court's order forbidding future requests for interviews concerning the vote of the jury was properly within its discretion, since the press enjoyed no special right of access to matters not available to the general public, such as jury deliberations); see also *United States v. Doherty*, 675 F. Supp. 719 (D. Mass. 1987) (issuing order deferring release of jurors' names and addresses for seven days after return of verdict); *United States v. Franklin*, 546 F. Supp. 1133 (N.D. Ind. 1982) (issuing order prohibiting juror interviews on premises of courthouse). The records in both adoption proceedings and cases involving trade secrets are often completely exempt from public disclosure. See Annotation, *Restricting Access to Judicial Records of Concluded Adoption Proceedings*, 83 A.L.R.3d 800 (1978); Annotation, *In Camera Trial or Hearing and Other Procedures to Safeguard Trade Secrets or the Like Against Undue Disclosure in Course of Civil Action Involving Such Secret*, 62 A.L.R.2d 509 (1958).

²⁷⁶ See *Shepler v. Crucible Fuel Co.*, 140 F.2d 371, 374 (3d Cir. 1944) (quoting *Arkansas Bridge Co. v. Kelly-Atkinson Constr. Co.*, 282 F. 802, 804 (8th Cir. 1922)) ("The law requires that errors, to be reviewable, must have been definitely and timely called to the attention of the trial court, in order to afford that court a fair opportunity to pass upon the matter, and correct its own errors, if any.").

determination will rest upon the sound discretion of the trial court. In the event of an appeal from an adverse ruling, the trial court's original tape recording, along with the rest of the record, would be sent to the appellate court. In reviewing such a decision, the appellate court would continue to apply the "effect upon the judgment" test for determining whether the discussion of insurance constituted grounds for a new trial.

When the case finally reaches its ultimate conclusion, the original tape would be stored with the case file as under current procedure. Parties would be required to return the tapes and be prohibited from making duplications. Although this could be enforced through sanctions,²⁷⁷ the temptation may precipitate more transgressions than would be acceptable. As an alternative, counsel desiring the tape could be required to purchase their copy from the court to defray the expense of administering the system. Unless consent is obtained from the jurors,²⁷⁸ counsel could be ordered to prevent further duplication or distribution of the tape except for in-house, professional, educational purposes.²⁷⁹

Although the federal government and many state jurisdictions prohibit the use of recording devices in the jury room, the policies underlying the prohibition do not seem threatened by this procedure.²⁸⁰ The clearest exposition of these policies is contained in the rather sparse legislative history to 18 U.S.C. § 1508,²⁸¹ the federal statute banning the recordation of federal jury deliberations. In a letter sent to the Chairman of the Senate Judiciary Committee by then Deputy Attorney General William P. Rogers, who favored the statute, Rogers stated:

²⁷⁷ A party who disobeys an order of court may be held in contempt. *See* *Lichtenstein v. Lichtenstein*, 425 F.2d 1111, 1113 (3d Cir. 1970), *modified on other grounds*, 454 F.2d 69 (3d Cir. 1972).

²⁷⁸ Though there is no clear documentation, it appears that the censure of the directors of the Chicago jury project and the enactment of 18 U.S.C. § 1508 (1956) were caused, in part, by the failure of the project directors to obtain the consent of the jurors whose deliberations they recorded.

²⁷⁹ *See* *Gentron Corp. v. H.C. Johnson Agencies, Inc.*, 79 F.R.D. 415, 418-19 (D. Wis. 1978) (pursuant to FED. R. CIV. P. 26(c), court ordered sequestration of discovery documents except for release to plaintiff's employees, attorneys, or experts).

²⁸⁰ Neither is there any conflict between the primary objectives of Rule 606(b) and the proposed use of recording devices in the jury room. Because a record of the deliberations would be made as they occurred, implementation of this idea would obviate the need for future contact with the jury. This, in turn, would eliminate the prospect of jury harassment and tampering.

²⁸¹ *See* H.R. Rep. No. 2807, 84th Cong., 2d Sess., 1, *reprinted in* 1956 U.S. CODE CONG. & ADMIN. NEWS 4149.

Such practices, however well intentioned, obviously and inevitably stifle the discussion and free exchange of ideas among jurors. They tend to destroy the very basis for common judgment among the jurors, upon which the institution of trial by jury is based, and are inconsistent with the purposes of the seventh amendment to the Constitution of the United States, which requires that trial by jury shall be preserved.²⁸²

As this correspondence reveals, the legislation appears to have been initiated with one purpose in mind: to protect the open and robust discussion of issues in the jury room, and so preserve the integrity of the civil jury system as a whole. Although not a specified objective, it also seems apparent that this prohibition was intended to conserve the resources of the judicial system by protecting the finality of judgments from later attack. Though the recordation of jury deliberations may appear to offend these policies, this is less than clear. A further examination reveals, in fact, that it may promote fairness and efficiency in our judicial system.

Admittedly, except for seating the judge in the jury room, it would be hard to have any closer, more direct scrutiny of the jurors than by installing a recording device. Yet it does not necessarily follow that such intensive examination of the deliberation process will inhibit jurors from openly expressing themselves in the jury room. Attempts can and should be made to reduce the inhibiting effect of such scrutiny. As noted above, some of these would include informing the jury of the purpose and location of the device, and situating it in an area that is not too obtrusive or distracting. This approach has been used with success in jury studies that have employed recording devices to examine the deliberative process of mock juries.²⁸³ Prohibiting the judge and attorneys from contemporaneously monitoring the tape should also help prevent any chilling effect, as would secluding the tape from general public scrutiny.

Even if all of these steps are followed, however, it is still possible that the "presence" of the device could influence the behavior of the jury. The critical question, and one that is not susceptible to a definite answer, is whether this influence will be positive or negative. The assumption underlying the state and federal prohibitory statutes is that it will be negative—that is, jurors will be discouraged from discussing legitimate concerns or interacting in an appropriate manner. It is, however, just as likely, perhaps more so, that jurors would censor only considerations that

²⁸² *Id.* at 3, reprinted in 1956 U.S. CODE CONG. & ADMIN. NEWS 4151.

²⁸³ See, e.g., HASTIE STUDY, *supra* note 17, at 51. ("A small television camera was positioned in one corner of the room out of the direct sight of the jurors. They were instructed that a recording would be made of their activities during deliberation.").

are irrelevant to the issues in the case as explained to them by the judge's instructions.

This conclusion seems to be supported by the available research on the subject.²⁸⁴ Perhaps the most comprehensive study of jury deliberations was conducted by Reid Hastie, Steven Penrod, and Nancy Pennington.²⁸⁵ Their findings are documented in their book, *Inside the Jury*.²⁸⁶ To enhance the authenticity of the project, the authors attempted as much as possible to simulate the experiences of actual juries. To this end, subjects participating in the study were recruited from jury pools in three counties in Massachusetts, were subjected to a brief *voir dire*, and were seated in an actual courtroom where they were shown a videotaped re-enactment of an actual homicide trial.²⁸⁷ After viewing the tape, which included instructions by a judge, the juries were taken to an adjoining deliberation room and were then informed that their deliberations would be recorded.²⁸⁸

The resulting deliberations were evaluated on a variety of bases, including breadth and relevance.²⁸⁹ To measure the breadth of the

²⁸⁴ Only a few studies have recorded and analyzed live mock jury deliberations. See, e.g., HASTIE STUDY, *supra* note 17; Kessler, *Social Psychology*, *supra* note 17, at 73 (discussing Forston, *The Decision-Making Process in the American Civil Jury: A Comparative Methodological Investigation* (1968) (Ph.D. dissertation, University of Minnesota); James & Simon, *Status and Competence of Jurors*, 69 Am. J. Soc. 563-70 (1959); Kessler, *A Content Analytic Comparison of Six- and Twelve-Member Jury Decision-Making Processes* (1973) (Ph.D. dissertation, University of Michigan)).

²⁸⁵ See HASTIE STUDY, *supra* note 17.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 45-46.

²⁸⁸ *Id.* at 51.

²⁸⁹ To properly analyze these factors, an intricate methodology was developed and employed by the authors:

The study's classification scheme was designed to capture the major events that were relevant to the jury's explicit information-processing task. The heart of the scheme was a system to code verbal references to evidence, the law, and statements of the relationships between the evidence and the law.

Each jury deliberation was coded by one of two coders, working directly with the videotapes, who scored each "utterance" into four kinds of categories. Category one identified each speaker by seat number (1 to 12). Categories two and three identified the content of each utterance with reference to the trial facts (evidence or testimony) and the legal issues (judge's instructions) that should be central to the jury's task of rendering a verdict. Category four indicated the type of each remark. Remarks were classified as conveying information (assertion), asking for information (question), or urging the group to take action as in a vote (direction). Special codes were used to indicate events such as balloting, requests for further instructions from the court, and declarations of deadlocking. For a given event in deliberation, the speakers, the facts, the legal issues, and the remark types identified the verbal activity, discussion, or procedural activity, such as receiving further instructions from the trial judge, that was occurring. Thus, the

deliberations, the authors relied upon two indices: the total number of different facts alluded to by the jury members (out of a possible forty-three) and the total number of key fact citations (out of a possible fifteen).²⁹⁰ They found that the average jury considered about eighty-five percent of the relevant material.²⁹¹ Conversely, the results indicated that irrelevant remarks occurred "at a negligibly low rate (about one percent of total speaking entries)."²⁹² Equally insignificant were the juries' considerations of evidence that the judge had instructed was inadmissible. According to the authors, the juries that were studied routinely followed the court's instructions to disregard irrelevant evidence.²⁹³ And when jurors attempted to discuss such matters, they were usually blocked by other jurors.²⁹⁴

From these findings, it appears that the presence of the recording devices in the jury room had little impact upon the legitimate aspects of the jury's deliberations. Besides considering a high percentage of relevant facts, the juries studied also entertained other matters usually considered important to the fact finding mission. These included discussions of the standard of proof, the credibility of the witnesses, and the judge's instructions.²⁹⁵ In this regard, the authors observed that "[t]he volume of remarks contributed by individual jurors showed considerable variation across jurors."²⁹⁶

The recording devices appear to have had more of an effect upon the juries' consideration of irrelevant and improper matters. Although the findings seem to suggest a virtual absence of jury misconduct during deliberations, the authors cautioned that "it would be unwise to generalize from these observations to actual jury behavior."²⁹⁷ For example, it was

basic unit for an analysis of deliberation content was the four-variable, speaker-fact-issue-type entry.

Id. at 54.

²⁹⁰ *Id.* at 85.

²⁹¹ *Id.*

²⁹² *Id.* at 89.

²⁹³ *Id.* at 87, 231.

²⁹⁴ *Id.*

²⁹⁵ See *id.* at 83-87 & tables 5.1, 5.2.

²⁹⁶ *Id.* at 98. Although the authors observed that "[m]ost juries included a few members who did not participate in oral discussion at all," *id.*, this finding was not attributed to the presence of the recording devices in the deliberation room. Rather, the authors concluded that such participation levels were caused "by a combination of factors, including individual differences in talkativeness, a dominance hierarchy within the group, and social conventions concerning polite debate." *Id.* at 92. Noting that these jurors often were members of large factions, it was also posited that "they found their points of view being expressed by other jurors." *Id.*

²⁹⁷ *Id.* at 231.

noted that, contrary to the results obtained in the instant study, a considerable body of research has demonstrated consistently that jurors are unable to disregard "biasing extralegal testimony."²⁹⁸ In explaining this discrepancy, the authors concluded that the experimental juries in the present study may have been abnormally well behaved when dealing with the inadmissibility issue because they were aware that their deliberations were being observed by social scientists.²⁹⁹ This "good behavior" syndrome was also credited for inhibiting irrelevant remarks generally among the jury members.³⁰⁰

These findings fail to justify the exclusion of recording devices from the jury room. According to the Hastie study, the presence of recording equipment seemed to facilitate rather than stifle the discussion and free exchange of ideas among jurors. Indeed, if the introduction of such technology had any effect at all, it appears to have impeded the consideration of only impermissible matters. In this way, the use of recording devices may actually make the jury system more credible, thus promoting, rather than undermining, the fair trial guarantees of the seventh amendment.

To have this salutary effect, however, it appears necessary that the jurors be able to discriminate between permissible and impermissible behavior in the jury room. They must be told not only what they may consider, but what they may not, so they can guide their deliberative behavior accordingly. Under current practice, such a candid approach may have serious side effects, such as confusing the jury or enticing them to dwell only on the forbidden areas of discussion. Recording the jury's deliberations, however, may free the court from this concern. The presence of the recording device in the jury room not only would detect any such undesirable effects, but, because of its inhibiting impact on improper conduct, should serve to prevent them from playing a role in the jury's decision. This would prove especially auspicious in the insurance question context in which proponents of the rule prohibiting insurance references have complained that such references distract jurors and influence their

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 43, 87, 89; J. GUINThER, *supra* note 17, at 85. This syndrome is not unique to jury dynamics; rather, it may be exhibited in a variety of common life experiences. Consider a simple hypothetical. Suppose two individuals are driving down the same highway with a posted speed limit of 55 m.p.h. One is traveling 55 m.p.h., the other 75 m.p.h. Along the side of the road is a police car with a radar gun conspicuously mounted on the door. Upon seeing the police car, the motorist traveling 55 m.p.h. is unlikely to alter her behavior since it is in compliance with the law. However, the driver exceeding the speed limit is bound to apply the brakes as quickly and firmly as possible. Even if the speeder fails to observe the police car, the other motorist is likely to signal to her that she needs to reduce her speed.

deliberations. The instant approach might allow courts to eliminate the rule, discuss the role of insurance openly in the courtroom, and still protect parties from the possible prejudicial effect of these references.

Determining the impact of such recording devices upon the behavior of the jury is also important for assessing the strength of the other policy argument against their use. It is the notion that we should not look too closely at jury deliberations, because we may not like what we find. And once we find what we do not like, it will cost far too much time, effort, and money to make it right. While that may be true, we have no way of knowing for sure unless we look. By looking with the help of modern technology, we might find that the technology itself may solve part of the problem.

The fear that too much scrutiny of jury behavior will result in an avalanche of motions, appeals, and retrials is founded on a mistrust of counsel, of jurors, or of the system itself. If it is believed that counsel will abuse this procedure by making frivolous motions based upon trivial defects in the deliberation process, this type of concern is not novel, for it exists for any procedural device available for strategic use.³⁰¹ The system can and has attempted to curb such behavior, with varying degrees of success, through sanctions or disciplinary action.³⁰² When the alleged jury misconduct is real, as would be evinced by the tape, the integrity of the whole system benefits from correcting the wrong, regardless of the cost of doing so. If it is feared that jurors are so corrupt or so incompetent that the "real" instances of misconduct would be too numerous and thus too taxing on the system to correct, a concern which the Hastie study seems to refute, then perhaps the system needs to be discarded or changed. One way of doing so would be to scrutinize the decisionmaking process of juries through use of recording devices. If this technology were employed, the rampant misconduct that is presently feared may not just be detected, it might be inhibited and eliminated. As a result, the bases for motions, appeals, and retrials may actually be reduced, and the burden to the whole system alleviated. For cases where illicit considerations are detected by the recording, the insight offered to the court by this technology will not only

³⁰¹ Indeed, it was the rampant abuse of discovery tactics which led to amendments of the Federal Rules of Civil Procedure in 1980 and 1983. 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2001, at 4 (Supp. 1991). One of the 1983 amendments was made to Rule 11, broadening the availability of sanctions for just such abuses. 5A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1331, at 17-19 (2d ed. 1990). Since its amendment, Rule 11 itself has been subject to so much overuse, if not misuse, that many in the legal community are now calling for its revision. See Gibbons, *Revisions of Rule 11 Are Urged*, NAT'L L.J., July 29, 1991, at 21.

³⁰² See FED. R. CIV. P. 11.

expedite the appellate review process, but it will make the ultimate disposition of cases more fair.

As novel as this procedure may appear, its advent may be facilitated, or indeed, foreshadowed by recent developments in both state and federal court systems. In the last decade, courts have shown an increased willingness to allow electronic technology into the courtroom.³⁰³ Forty-four states now permit television cameras to videotape court proceedings.³⁰⁴ In July of 1991, a three-year test allowing television cameras in eight federal courts was commenced.³⁰⁵ For many years, courts have utilized videotaped evidence in complex litigation and have become equipped with electronic equipment.³⁰⁶

As a result of these developments, judges, attorneys, and especially jurors are now becoming comfortable with the presence of such devices in modern litigation.³⁰⁷ As this familiarity broadens, the novelty of placing recording devices in the jury room will continue to diminish, thereby curtailing any inappropriate inhibiting effect that such devices might have upon juries.³⁰⁸ Given this trend, the time seems nigh to at least begin considering implementing this procedure in federal and state courts. For

³⁰³ See Copen, *Courts of the Future*, 77 A.B.A.J. 74 (1991) (describing the modern technology currently being used by state and federal courts).

³⁰⁴ Lippman, *We, the (TV) Jury*, L.A. Times, June 30, 1991, (Calendar), at 5, col. 4, at 65, col. 1.

³⁰⁵ *Id.* at 65; see Heinke, *TV in the Courtroom Can Act as Primer on Legal System*, L.A. Times, July 1, 1991, (Calendar), at F3, col. 3-4.

³⁰⁶ See, e.g., Fadely, *Use of Computer-Generated Visual Evidence in Aviation Litigation: Interactive Video Comes to Court*, 55 J. AIR L. & COM. 839 (1990); Figari & Loewinsohn, *Videotaped Depositions Come to Court*, 14 LITIG. 35 (1988); Comment, *Videotaped Testimony in Child Sexual Abuse Cases: United States v. Binder*, 23 WILLAMETTE L. REV. 193 (1987).

³⁰⁷ In New York, where since 1987 cameras have been used to record trials as part of an experimental project, the presence of these devices in the courtroom appears to have had no adverse impact upon the proceedings. See Crosson, *Cameras in Courts Do Not Adversely Affect Conduct of Court Proceedings*, N.Y.L.J., May 1, 1991, at 40. Both New York and New Jersey are now considering measures which would greatly expand the use of videotaping equipment in many types of trials, either replacing or supplementing traditional reporting techniques. See *id.* (discussing New York developments); Riss, *Videotaping Trials is Recommended*, N.J.L.J., June 27, 1991, at 1 (discussing New Jersey proposal).

³⁰⁸ Even though the New York experience has disclosed no adverse affects from using cameras in the courtroom, see Crosson, *supra* note 307, the risk of behavior modification in that context seems greater, and more pernicious, than it would be if recording devices were installed in the jury room. The presence of such equipment in the courtroom not only threatens to distract the jury's attention from the evidence being presented (in most cases, the only opportunity they will have to see and hear it), it also may affect the accuracy of the evidence itself by altering the behavior of the witnesses.

courts grappling with the insurance reference dilemma, it may even be an idea whose time has come.

VII. CONCLUSION

Although the insurance exclusionary rule grew out of the post-industrial litigation boom of the late nineteenth century, it appears that it still may serve a useful purpose in modern litigation. Contrary to the protestations of the rule's critics, insurance references still tend to heighten jurors' awareness of the existence of insurance, and this often influences their decisionmaking process in a way forbidden under American jurisprudence. Because the exclusionary rule helps to inhibit this process by minimizing such references, its retention appears justified, provided it can be administered in a reasonably efficient fashion. This now appears possible both during *voir dire*, by using juror questionnaires, and at trial, by carefully screening cases before trial for possible insurance issues. While rigorous application of these devices can reduce the likelihood of jury indoctrination, it does nothing to reveal if, in fact, such indoctrination has occurred, or the effect, if any, which it has had upon the deliberations of the jury. This could be accomplished, however, either through juror affidavits, post-trial interviews with the jury foreperson, or by recording the jury's deliberations. By thus eliminating the guesswork currently necessitated under current practice, these approaches may obviate the need for the rule itself.